TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 137.

JACOB NEWMAN AND SALMON O. LEVINSON, SURVIVING PARTNERS OF THE FIRM OF NEWMAN, NORTHRUP & LEVINSON, PLAINTIFFS IN ERROR,

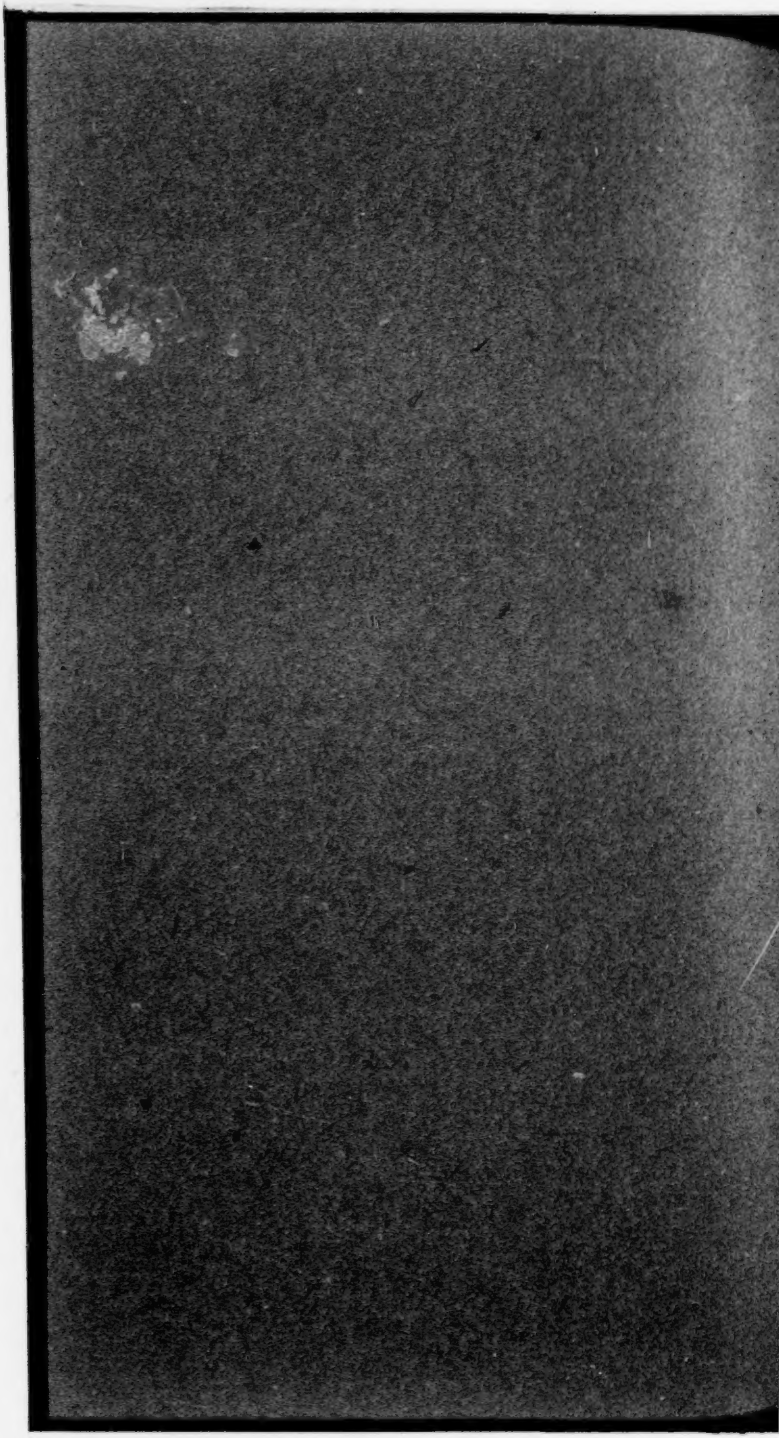
vs.

HARRY B. GATES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED OCTOBER 23, 1905.

(19,940.)



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1 STATE OF INDIANA:

In the Appellate Court.

Be it remembered, That heretofore, to-wit: On the 17th day of March, 1902, the same being the 97th Judicial Day of the November Term 1901 of said Appellate Court, Jacob Newman and S. O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, by William A. Ketcham and Charles Martindale, their attorneys, filed in the office of the Clerk of the Appellate Court of Indiana, a transcript of the record and proceedings of the Marion Superior Court, being number 46,388 in said Court, in a cause wherein the said Jacob Newman and S. O. Levinson as surviving partners of the firm of Newman, Northrup & Levinson, were plaintiffs, and Harry B. Gates was defendant, together with an assignment of errors endorsed thereon, which transcript and assignment of errors are in the words and figures following, to-wit:

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" " " Recalled .....
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For Plaintiffs.

Judd, Edward J. .....
Scott, Frank H. .....
Mathis, John C. .....
Tenney, Horace K. .....
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6 STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court of Marion County.

JACOB NEWMAN and S. O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson,
vs.
HARRY B. GATES.

Præcipe for Transcript for Appeal to the Appellate Court of Indiana.

"The Clerk will please prepare and certify a full, true and complete transcript of the proceedings, papers on file, and judgment, including all bills of exceptions, except that the Clerk need not make a transcript of the plaintiffs' original bill of exceptions, No. 2, containing the evidence and rulings thereon, but will embrace said original bill of exceptions containing the evidence and rulings of the court thereon, in transcript in the above entitled cause, to be used on appeal to the appellate Court of Indiana.

Sept. 26, 1901.

CHARLES MARTINDALE,
W. A. KETCHAM,
Att'ys for Plaintiffs.

7 Be it Remembered, That among the Records of Proceedings had, Papers filed, Motions decided, Rulings made, Exceptions noted, Judgments rendered, Decrees entered etc. in the Superior Court of the County of Marion, State of Indiana, are the following in the cause of

No. 46388.

JACOB NEWMAN, GEORGE NORTHRUP, JR., S. O. LEVINSON
vs.
HARRY B. GATES.

And be it also Remembered, That heretofore, to wit: on the 22nd day of December, 1893, the above named Plaintiffs, by Charles Martindale, their Attorney, filed in the Office of the Clerk of said Superior Court, a Complaint against said Defendant, in the words and figures following, that is to say:

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE NORTHRUP, JR., S. O. LEVINSON
vs.
HARRY B. GATES.

Complaint.

8 The Plaintiffs, Complaining of the Defendant, say that heretofore, to wit: on the 13th day of July, 1893, in the Circuit Court of Cook County, in the State of Illinois, at a Term thereof begun and held in Chicago, in said County and State, on the 3rd Monday, being the 19th day of June in the year of our Lord, Eighteen hundred and Ninety-three, the same being a Court of general jurisdiction, said Plaintiffs recovered a judgment against the Defendant for the sum of Thirteen Hundred Dollars ($1300.00) together with costs and charges in that behalf expended: that the said Judgment is unpaid, unappealed from, unreversed and not superceded, and is in full force and effect, and that there is due and unpaid to Plaintiffs thereon the sum of to wit: Fourteen Hundred Dollars, ($1400.00).

Wherefore, Plaintiffs pray Judgment against the said Defendant for the sum of Fourteen Hundred Dollars ($1400.00) and costs.

CHARLES MARTINDALE,
Att'y for Plaintiffs.

And afterwards, to wit: on the said 22nd day of December, 1893, being the 17th Judicial day of the General Term of said Superior Court for the month aforesaid, before the Hon. James M. Winters, James W. Harper and Pliny W. Bartholomew, Judges thereof, the following proceeding was had herein viz:

"Ordered, That Cause number 46,388, be assigned to Room three (3), for trial."

And afterwards, to-wit: on the 3rd day of January 1894, being the 3rd Judicial day of the Special Term of said Superior Court for the month aforesaid, before the Hon. Pliny W. Bartholomew, Judge presiding in said Room Three (3) the following proceeding was had herein:

"Comes now the Defendant by Counsel and files his Demurrer to the Plaintiffs' Complaint herein which Demurrer is in the
9 words and figures following, to wit:

"STATE OF INDIANA, *Marion County, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Demurrer.

The Defendant Harry B. Gates, Demurs to the Complaint herein for the reason that it does not state facts sufficient to constitute a cause of action.

BAKER & DANIELS,
Att'ys for Defendant."

And afterwards to-wit: on the 20th day of January 1894, being the 18th Judicial day of the said January Term of the Court, the following proceedings were had herein:

"Come the parties by Counsel and the Court having examined the Defendant's Demurrer to the Complaint herein and being fully advised in the premises, overrules said Demurrer, to which ruling of the Court, the Defendant, at the time, excepted."

And afterwards, to-wit, on the 7th day of March 1894, being the 3rd Judicial day of the March Term 1894 of said Court before the same Hon. Judge, the following proceedings were had herein:

"Comes now the Defendant by Counsel and files his Answer and Counter Claim herein, and on said motion of said Defendant the Plaintiffs are ruled by the Court to Reply to the same. Said Answer and Counter Claim are in these words and figures, viz:

STATE OF INDIANA, *Marion County, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Answer and Counter-claim.

First Paragraph. Comes the Defendant and for Answer to Plaintiffs' Complaint herein says, that he denies each allegation thereof.

Second Paragraph. For a further and second Paragraph of Answer to Plaintiffs' Complaint herein the Defendant says, that the said

Circuit Court of Cook County, Illinois, in the proceedings had, and in the alleged Judgment rendered by said Court as averred in the Complaint in the action of the Plaintiffs herein against the Defendant, did not have jurisdiction of the subject matter of said action, for reason that the declaration in said action counted upon a joint liability of two Defendants viz. Alfred B. Gates and Harry B. Gates, and it did not count upon a several liability of the said Harry B. Gates; that to said declaration, which was verified by the plaintiffs, the said Harry B. Gates pleaded an answer of non assumpsit, and the issue thus joined, remained unchanged until the day of Trial on which day the Plaintiffs in said action, in said Cook Circuit Court dismissed said action as to said Defendant, Alfred B. Gates, he not having been served with process in said Court and not having appeared therein in person or by Attorney, and after the Dismissal of
11 said action as to the said Alfred B. Gates, the Court proceeded to the Trial of said action upon the theory that the declaration charged a several and individual liability against the said Harry B. Gates and the Trial proceeded upon that theory and no other and the said alleged Judgment against the said Harry B. Gates was rendered upon that theory and no other when in truth and in fact the only theory upon which the said Circuit Court of Cook County had originally taken jurisdiction of said action was the theory that the declaration alleged a joint liability, and the said declaration, after the answer of the said Harry B. Gates in said action was filed, was never changed by amendment or supplement or by any other character of pleading, but the said declaration remained the same as it was when it was originally filed and when said Answer of the said Harry B. Gates addressed thereto was filed, except only that the said declaration was dismissed as to the said Alfred B. Gates, who was alleged to be jointly, and only jointly liable with the said Harry B. Gates to the Plaintiffs.

Wherefore the Defendant prays Judgment for Costs.

Third Paragraph. The Defendant, by way of Counter Claim against the Plaintiffs and each of them, says, that the Plaintiffs are and for more than two years last passed have been partners engaged in the Practice of Law in the City of Chicago, Illinois, under the firm name of Newman, & Northrup: that prior to the first day of September, 1892, there was in existence a Corporation which had theretofore been organized under the laws of the State of Indiana under the Corporate name of The American Mortar Company; that prior to said 1st day of September, 1892 said Company had been engaged in business in the City of Chicago Illinois, and it owned a plant including Real Estate which were located in the City of Waukegan, State of Illinois; that said Company
12 prior to said date last named having become financially embarrassed it was decided by the stockholders and officers of the said Company that it was advisable and proper for said Company to make a Statutory assignment for the benefit of its creditors, that in pursuance of said decision, the then President of said Company Alfred B. Gates went to the City of Chicago and took with him the Defendant herein who was neither an officer, stockholder, nor

creditor of the said American Mortar Company and had no connection of any kind whatever with said American Mortar Company, but who had been requested to become the Trustee to whom the Deed of Assignment from said Mortar Company should be made; and after reaching Chicago, the said Alfred B. Gates and this Defendant went to the Law Office of the said Newman & Northrup and presented a letter of introduction from a firm of Indianapolis Lawyers who were the correspondents of the said Newman & Northrup and thereupon the said Alfred B. Gates stated the object of their call upon the said Newman & Northrup, as Attorneys, to attend to the legal matters necessary to the perfecting of a statutory assignment for the benefit of creditors of the said American Mortar Company, and gave to said Newman & Northrup the name of this Defendant, Harry B. Gates, as the person to whom such assignment should be made, that thereafter the said American Mortar Company, under the advice and legal direction of the said Newman & Northrup, did make a Deed of Assignment, in pursuance of the Statute in that behalf of all of its property of whatsoever kind, to this Defendant, Harry B. Gates, as trustee, who filed his Bond and duly qualified as such Trustee, under the legal advice and direction of said Newman & Northrup, who thereupon, were requested by the said Harry B. Gates to look after, direct and control all legal matters of whatsoever kind and nature it would be necessary and proper for him, as such Trustee to have looked after, directed and controlled by a
13 competent lawyer or lawyers, and the said Newman & Northrup held themselves out to be such competent lawyers and assumed to look after, direct and control, in behalf of said Harry B. Gates, as Trustee, as aforesaid, all the legal matters and business which his said position as Trustee made it necessary and proper for the staid Harry B. Gates Trustee, to have legal advice and services about and upon and thereafter the said Newman & Northrup superintended the preparation of Inventories and procuring the Order of Sale of property and rendered the other legal services affecting the said Trust to said Harry B. Gates as Trustee, and the said Harry B. Gates relied solely upon the advice and counsel of the said Newman & Northrup in his conduct and management of the said Trust with this exception only that some time after he had qualified as such Trustee the said Newman & Northrup employed a firm of lawyers at the City of Waukegan, to act with them in the Circuit Court of Lake County, Illinois, held at said City of Waukegan, that the said Newman & Northrup never informed said Harry B. Gates and never in any way advised him that it was the Law in the State of Illinois and had been so decided that a Trust Estate could only be made liable for the payment for legal services rendered to any Trustee or person in like legal capacity, by formal Order, duly entered, authorizing the employment of a lawyer for the rendition of such services, and that he was a laymen and did not know such to be the Law and that the said Newman & Northrup not only failed to so inform and advise the said Harry B. Gates, but they further failed and neglected, as his attorneys in said Trust, to procure any such Order at any time, or attempt to do so, and no such Order

ever was procured or attempted to be procured, and no such Order was ever made by any Court; that on the — day of — 1893, the Plaintiffs in this case, sued the said Alfred B. Gates and the said Harry B. Gates as joint Defendants in the Circuit Court
14 of Cook County, Illinois, upon a Common Count in Assumpsit; that the said Harry B. Gates was served with process in said action and appeared therein and filed an answer of non-assumpsit; that said Alfred B. Gates was never served with process and never appeared in said action by Attorney or in person, and that after the issue was joined by the Answer of Harry B. Gates to the declaration charging a joint liability as against himself and Alfred B. Gates, the said cause was set down for Trial, and immediately before the Trial thereof was commenced and not before said time, said Plaintiffs in said action dismissed said action as to said Alfred B. Gates and proceeded with the Trial as against the said Harry B. Gates, and in said Trial the said Newman, Northrup & Levinson took the position that the Circuit Court having jurisdiction of the matter of the assignment of the American Mortar Company had never made and entered of Record an Order authorizing the employment of themselves as Attorneys, or of any other Attorneys by the said Harry B. Gates as Trustee, and that no such Order ever was made by any Court, that they had rendered services as Attorneys to the said Harry B. Gates which had been accepted by him, and by the Law as it had been announced by the Supreme Court of Illinois and by the Appellate Court, by whose decision the said Circuit Court of Cook County was bound the said Harry B. Gates was personally and individually liable to them for such services rendered and accepted in the absence of an Order of Court having jurisdiction of the subject matter in the said Assignment, authorizing a charge against the said Trust Estate of the amount of their reasonable fees for services to be rendered and that had been rendered, and adduced Evidence in accordance with such position and the said proposition of Law, and the said Circuit Court of Cook County Illinois, agreeably with said proposition of
15 Law made a finding against the said Harry B. Gates personally, as upon a *quantum merint* for services rendered to him as aforesaid by the said Newman & Northrup in the matter of said Trust and not otherwise, and rendered judgment against him in pursuance of said finding and that the alleged Judgment sued upon in this case was and is a judgment so assumed to be rendered by the said Circuit Court of Cook County, Illinois and is no other or different judgment; that never before and not until the Trial of said cause had begun, did the said Newman Northrup or Levinson or any Agent or Employee of them inform this defendant in any way, that in the absence of an Order of the Court having jurisdiction of the subject matter of said Assignment, he individually or personally would be liable for legal services to him rendered as Trustee, in the said Assignment, and never informed him that they would hold him personally liable for any such service, but to the contrary, by letter and by word of mouth they gave him to understand that the Trust Estate would be liable for their fees as Attorneys for serv-

ices rendered to him as such Trustee; that the neglect of the said Newman, Northrup & Levinson, the Plaintiffs in this cause, so as aforesaid to procure a proper Order of the proper Court authorizing the said Harry B. Gates, as Trustee, to employ Attorneys for legal advice and services, and their neglect to inform the said Harry B. Gates that such Order of the Court was necessary for his protection personally and individually, was the cause and the only cause of the rendition of the said assumed judgment sued upon in this case, and that by the rendition of the said judgment the said Harry B. Gates was damaged not only in the amount of said judgment, interest and costs, but in the amount of his Attorneys' fees cost of litigation and expenses of travel in going to Chicago to be present in the Trial of said case in the Cook Circuit Court, and his costs and expenses in this present action in which he is now being
16 sued upon the said assumed judgment of the Circuit Court of Cook County, Illinois and that said damages amount to over the sum of Two thousand dollars.

That after the payment of his preferred claims and upon dismissal of said assignment proceedings in the manner hereinafter stated there were, no assets of the said American Mortar Company in the hands of the said Harry B. Gates, as Trustee, out of which, upon a proper Order of Court, he could procure the money with which to pay the amount of said assumed judgment or any salary or compensation to himself as Trustee as aforesaid, or to re-pay to himself as Trustee, any cash which he had advanced personally while so acting as Trustee for the benefit of said Trust Estate; nor were there any assets with which, upon proper Order of Court, he could pay any part, either of said judgment or of his own compensation or re-pay any part of his own advances; that but for the improper and fraudulent conduct of the said Newman, Northrup & Levinson in advising and giving legal advice to the said Harry B. Gates, as Trustee, as hereinafter stated, there would have been assets of the said American Mortar Company in his hands at the time of dismissal of said assignment, which the Court having jurisdiction, could have applied towards the payment of the indebtedness last above referred to; that an Order of the sale of the Assets of said American Mortar Company was procured to be made and the said sale was set and and advertised for the 18th day of April, 1893; that before said 18th day of April 1893, the said Newman & Northrup presented the said Harry B. Gates a bill for services rendered in the sum of $2000.00; that the said Gates informed the said Newman, Northrup & Levinson by letter that the said demand was exorbitant and could not be paid and further that he would call upon them, the said Newman, Northrup & Levinson, on the 17th day of April, 1893; to which letter the said Newman, Northrup & Levinson re-
17 sponded by letter, that their claim was $2000.00 and that they would be pleased to see him on the 17th of April, 1893, and that they trusted "that this matter will be adjusted before the 17th," that on the 18th day of April, 1893, the said Harry B. Gates was present at the place set for sale of said assets of the said American Mortar Company, and the said Levinson of the said firm of

Newman & Northrup, was present as his legal adviser; that he proceeded to cry the sale of said assets and bids were received from several persons, the last bid upon which the property was struck off was made by two parties jointly for an amount in excess of $5300.00, and said last named bid was made by one who was financially responsible and ready to make good his bid, named —— O'Brian, that said Harry B. Gates struck off and sold to said parties making the last bid, and thereupon said Trustee demanded that a cash payment be made at once by the said two parties upon their bid aforesaid; that the said two parties by a telephonic communication with the said Newman & Northrup in the city of Chicago, requested the said Newman & Northrup for leave to draw upon them for the amount of the cash payment necessary to make good their said bid; and this authority was refused by the said Newman & Northrup, and thereupon the said two parties withdrew their said bid and thereupon the said Levinson as attorney for the said Harry B. Gates as Trustee, advised the said Harry B. Gates that he must at once re-offer said assets for sale, and the said Harry B. Gates proceeded so to do; that the said —— O'Brian, also had on the first offering for sale bid an amount in excess of $5000.00, was again a bidder and the said S. O. Levinson also bid and after the said Levinson made two bids the said —— O'Brian, who had on the first offering bid in excess of $5000.00, challenged the right in the presence of the said Trustee, of the said Levinson to bid, because he was
the attorney of the Trustee, and publicly announced to the
18 said Harry B. Gates, Trustee, in the presence of the said Levinson, that he would not bid against the said Levinson, and he thereupon refused to bid against the said Levinson and he did not further bid against the said Levinson, and the said Levinson bid only $3000.00 for the assets, and advised the said Harry B. Gates, Trustee, that the sale must be made to the said Newman & Northrup for whom he was bidding; and advised the said Trustee to strike off the said property to the said firm, and the said Trustee, acting upon said advice, did so strike off the said property to the said Newman & Northrup and received from them a check upon a Chicago Bank in payment of their said bid: that the said sale was reported to the said Circuit Court having jurisdiction of the said assignment, but before the same was approved by the said Court by a proper Order, the fact developed that after the sale the Mortgagee of all the property of the said American Mortar Company, being the assets so offered for sale, and so sold, had, in pursuance of the Law, gone into the possession of the said property and was holding the same and gave out that he intended to so hold the same against the said Trustee, and the purchasers aforesaid from the said Trustee, and thereafter the said Newman & Northrup as individuals and in their own behalf only and against the protest of the said Trustee, petitioned the said Circuit Court, having jurisdiction of said assignment, not to confirm said sale and to release them from their bid, and the said Circuit Court did so release the said Newman & Northrup from their said bid; that thereafter the said Mortgagee, having procured the consent in writing of the said

debtor, the American Mortar Company, and of a majority of its creditors in numbers and amount, in pursuance of a statute of the State of Illinois in that behalf procured the discontinuance of the said asset assignment proceedings and the said assignment proceeding were discontinued by Order of the Court, and at the time
19 of such discontinuance the said Trustee did not have in his hands or possession any assets of the Mortar Company out of which he could pay any part of the said demand of Newman & Northrup for attorney's fees, or his own claims for compensation and cash advanced; that the said ——O'Brian, who as aforesaid, bid upon the first offering of said assets for sale by said Trustee, an amount in excess of $5000.00 was advised of the fact said sale was made subject to all mortgages and of other facts in the premises, and financially responsible and able to pay his said bid, and upon said second offering he would have bid an amount in excess of the amount so as aforesaid bid by the said Newman and Northrup, upon which the sale was made and would have completed the purchase if the property had been then stricken off to him, and the said O'Brian was deterred from bidding at the second offering only by the fact that he was unwilling to bid against the said firm of Newman & Northrup so long as they were acting as the legal advisers of the said Gates, Trustee; that the said acts of the said Newman & Northrup, with respect to the said sale, were committed by them, of their own motion, and without any collusion on the part of this Defendant as Trustee or individually, and that he acted in making said sale, upon the legal advice of the said firm of Newman & Northrup and not otherwise, and that the said Harry B. Gates is not and never was a lawyer, and at said time ignorant of the legal effect of said conduct on the part of his legal advisers.

Wherefore, this Defendant says, that by the negligence and fraudulent conduct of the said Newman, Northrup & Levinson, as aforesaid, he was damaged in the sum of Twenty-five Hundred Dollars, for which amount he prays judgment against the said Jacob Newman, George Northrup, Jr., and S. O. Levinson, and he prays for all other proper relief.

BAKER & DANIELS,
Att'ys for Defendant.

20 And afterwards, to-wit: on the 10th day of March 1894, being the 6th Judicial day of the March Term 1894 of said Court before the same Hon. Judge the following proceeding was had herein, viz:

"Come now the Plaintiffs by Counsel and file their Demurrers to the second and third Paragraphs of the said Defendant's Answer herein in the words and figures following:"

"STATE OF INDIANA, *Marion County, ss:*

No. 46388.

Superior Court.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Demurrer.

The Plaintiffs Demurrer to the second Paragraph of Defendant's Answer herein, and for cause of Demurrer say, that the facts stated in said Paragraph of said Answer are not sufficient to constitute a cause of defense.

CHARLES MARTINDALE,
Att'y for Plaintiffs."

"STATE OF INDIANA, *Marion County, ss:*

No. 46388.

Superior Court.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Demurrer.

The Plaintiffs Demurrer to the Third Paragraph of the Answer of the Defendant herein, and for cause of said Demurrer say, that the facts stated in said Paragraph of the Answer, are not
21 sufficient to constitute a cause of defense.

CHARLES MARTINDALE,
Att'y for Plaintiffs."

And afterwards, to-wit: on the 11th day of April 1894, being the 9th Judicial day of the April Term 1894 of said Court before the same Hon. Judge, the following proceedings were had herein:

"Come the parties by Counsel and the Court having examined the Plaintiffs' Demurrers to the second and third Paragraphs of the Defendant's Answer herein, and being fully advised in the premises, sustains the said Demurrer to the second Paragraph of said Answer, to which ruling of the Court the Defendant, at the time, excepts. And the Court overrules the said Demurrer to the Third Paragraph of said Answer to which ruling of the Court the Plaintiffs at the time except, and the Plaintiff- *is* ruled by the Court to reply to the Third Paragraph of said Answer."

And afterwards, to-wit: on the 23rd day of May 1894, being the 15th Judicial day of the May Term 1894 of said Court before the same Hon. Judge, the following proceeding was had herein, viz:

"Come now the Plaintiffs by Counsel, and by leave of the Court first had, file their Amended Reply to the Third Paragraph of the Defendant's Answer herein, as follows, to-wit:"

"STATE OF INDIANA, *Marion County, ss:*

No. 46388.

Superior Court.

JACOB NEWMAN, GEORGE NORTHRUP, JR., S. O. LEVINSON
vs.
HARRY B. GATES.

Amended Reply.

22 The Plaintiffs replying to the Third Paragraph of Defendant's Answer denominated therein, a Counter Claim, say, that in an action begun on the 26th day of April, 1893, in the Circuit Court of Cook County in the State of Illinois, at the April Term of said Court, begun and held in the City of Chicago, in said County and State the same being a Court of general jurisdiction, wherein the Plaintiffs in this cause were Plaintiffs and the Defendant in this cause was Defendant, being the same action wherein the Plaintiffs herein recovered the Judgment against the Defendant set forth and described in the Complaint herein, the following proceedings were had:

UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the Hon. Frank Baker, one of the Judges of the Circuit Court of Cook County, at a Term begun and held at Chicago in said County and State on the third Monday, being the 19th day of June in the year of our Lord one thousand and eight hundred and ninety three and of the Independence of the United States the one hundred and seventeenth.

Present Honorable Frank Baker one of the Judges of the Circuit Court of Cook County State of Illinois. Jacob J. Kern, States Attorney; James H. Gilbert, Sheriff; Attest, Frank J. Gaueter, Clerk.

Be it remembered that heretofore, to-wit: on the 26th day of April A. D. 1893, there was filed in said Court a certain Præcipe for summons, directed to the Sheriff of Cook County, to execute which said Præcipe and said Writ together with the Return of the Sheriff thereon endorsed, are in the words and figures following, to-wit:

"STATE OF ILLINOIS, *Cook County, ss:*

23 Circuit Court of Cook County, April Term, A. D. 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Newman & Northrup, Plaintiffs,

vs.

HARRY B. GATES and A. B. GATES, Defendants.

Ass't Damages, $2000.00.

The Clerk of said Court will issue a Summons in the above entitled cause to said Defendants, in a Plea of Trespass on the case on promises, to the damage of the said Plaintiffs in the sum of Two thousand Dollars direct the same to the Sheriff of Cook County to execute and make it returnable to the May Term of said Court A. D. 1893.

NEWMAN & NORTHRUP,
Plaintiffs' Attorney-."

To Frank J. Gaulter, Esq., Clerk, Chicago, April 26th, 1893.

"STATE OF ILLINOIS, *Cook County, ss:*

The people of the State of Illinois to the Sheriff of said County, Greetings:

We command you that you summon Harry B. Gates and A. B. Gates if they shall be found in your County, personally to be and to appear before the Circuit Court of Cook County on the first
24 day of the Term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the third Monday of May, 1893, to answer unto Jacob Newman, G. W. Northrup, Jr. and S. O. Levinson as Newman & Northrup, in a plea of trespass on the case, upon promises, to the damage of said plaintiffs, as it is said, in the sum of Two Thousand Dollars.

And have you then and there this Writ, with an indorsement thereon in what manner you shall have executed the same.

Witness, Frank J. Gaulter, Clerk of our said Court and the seal thereof, at Chicago aforesaid, this 26th day of April A. D. 1893.

[SEAL.] FRANK J. GAULTER, *Clerk.*

Endorsed: "Served this Writ on the within named Defendant, Harry B. Gates, by reading the same to him this 26th day of April, 1893; other named Defendant not found in my County. P'd. 75. James H. Gilbert, Sheriff, by D. W. Nickerson, Deputy."

And afterwards to-wit: on the 5th day of May, A. D. 1893, there was filed in said Court a certain Declaration in the words and figures following, to-wit:

"In the Circuit Court of Cook County to May Term A. D. 1893.

"STATE OF ILLINOIS,
Cook County, ss:

Jacob Newman, George W. Northrup, and S. O. Levinson as co-partners, as Newman & Northrup, Plaintiffs in this suit by
25 themselves, complain of Harry B. Gates and A. B. Gates, Defendants in this suit summoned, etc. of a plea, of trespass on the case on promises:

For that whereas, the said Defendants, heretofore, to-wit: on the first day of November in the year of our Lord one thousand eight hundred and ninety-two, at Chicago, to-wit: at the County aforesaid, became and were indebted to the said Plaintiffs in the sum of Two Thousand Dollars of lawful money, of the United States of America, for divers goods, wares and merchandise, by the said Plaintiffs, before that time, sold and delivered to the said Defendants, and at the special instance and request of the said Defendants, and being so indebted to said Plaintiffs the said Defendants, in consideration thereof afterwards, to-wit: on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiffs, well and truly to pay unto the said Plaintiffs the sum of money last mentioned, when the said Defendants should be thereunto afterwards requested.

And whereas also, the said Defendants, to-wit: on the same day and year and at the place aforesaid, in consideration that the said Plaintiffs had before that time, at the like special instance and request of the said Defendants, sold and delivered to the said Defendants divers other goods, wares and merchandise of the said Plaintiffs the said Defendants then and there undertook and faithfully promised the said Plaintiffs that the said Defendants would well and truly pay to the said Plaintiffs so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said Defendants should thereunto afterwards — requested; and the said Plaintiffs aver that the said goods, wares and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth
26 the further sum of Two Thousand Dollars of like lawful money as aforesaid, to-wit: at the place aforesaid, whereof the said Defendant afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas also, the said Defendants afterwards, to-wit: on the same day and year, and at the place aforesaid, became and were indebted to the said Plaintiffs in the further sum of Two Thousand Dollars, of the lawful money as aforesaid, for money before had and — that time lent *not* advanced by the said Plaintiffs to the said Defendants, and at the like request of said Defendants. And in the like sum for other money by the said Plaintiffs before that time paid, laid out and expended for the said Defendants, and at the like request of the said Defendants. And in the like sum for other money, by the said Defendants before that time, had and received to and for the use of the said Plaintiffs. And in the like sum for other money

before that time and then due and owing the said Plaintiffs, for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said Defendants to said Plaintiffs. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiffs for the said Defendants and at the like special request of the said Defendants. And being so indebted, the said Defendants in consideration thereof afterwards, to-wit: on the same day and year and at the place aforesaid, then and there undertook, and then and there faithfully promised the said Plaintiffs well and truly to pay unto the said Plaintiffs the several sums of money in this Court mentioned, when the said Defendants should be thereunto afterwards requested.

And whereas also, the said Defen*fen*dants, afterwards, to-wit: on the day and year aforesaid, and at the place last aforesaid, accounted together with the said Plaintiffs of and concerning divers other sums of money, before that time due and owing from the
27 said Defendants to the said Plaintiffs and then and there being in arrears and unpaid, and upon such accounting the said Defendants, then and there were found to be in arrears and indebted to the said Plaintiffs in the further sum of Two Thousand Dollars of the lawful money aforesaid. And being so found in arrears and indebted to the Plaintiffs, the said Defendants in consideration thereof afterwards to-wit: on the day and year last aforesaid and at the place last aforesaid, then and there undertook and then and there faithfully promised the said Plaintiffs well and truly to pay unto the said Plaintiffs the sum of money last mentioned, when the said Defendants should be thereunto afterwards requested.

Nevertheless, the said Defendants, (although often requested, etc.,) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said Plaintiffs, but to pay the same or any part thereof, to the said Plaintiffs the said Defendants have altogether refused and still do refuse, to the damage of the said Plaintiffs of Two Thousand Dollars, and therefore the said Plaintiffs bring suit.

NEWMAN & NORTHRUP,
Plaintiffs' Attorneys."

Endorsements: "Circuit Court Cook County. Newman *et al. vs.* Gates *et al.* Common Courts with Affidavit. Fifth May 1893. Frank J. Gaulter, Clerk. Newman & Northrup Atty's.

Copy of Account Sued on.

"Harry B. Gates and A. B. Gates to Newman & Northrup, Dr.

To goods, wares and merchandise sold and de-
28 livered $2000.00
To money lent and advanced..... $2000.00
To money paid out and expended $2000.00
To money had and received to and for the use of Plaintiffs $2000.00
To money due for interest and forbearance..... $2000.00
To labor, services and material $2000.00
To balance due on account stated..... $2000.00

Circuit Court of Cook County April Term, A. D. 1893.

Plaintiffs' Affidavit of Amount Due.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Co-partners as Newman & Northrup, Plaintiffs,

vs.

HARRY B. GATES and A. B. GATES, Defendants.

"STATE OF ILLINOIS, *County of Cook, ss:*

W. M. Northrup, being duly sworn says he is the duly authorized agent in this behalf of said Plaintiffs and that the demand of the Plaintiffs in the above entitled cause is for money due for legal services rendered and disbursements expended by said Plaintiffs for said Defendants, at the special instance and request of said Defendants: and that there is due to the Plaintiffs from the Defendants, after allowing to Defendants all just credits, deductions and set offs the sum of Fifteen Hundred and Twenty Dollars.

W. M. NORTHRUP."

"Subscribed and sworn before me this 5th day of May, 1893.

[SEAL.] BENJAMIN W. BECKER,
Notary Public."

And afterwards to-wit: on the 17th day of May, A. D. 1893, there was filed in said Court, a certain appearance in words and figures following to-wit:

STATE OF ILLINOIS, *Cook County, ss:*

29 In the Circuit Court of Cook County, May Term, 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Newman & Northrup, Plaintiffs,

vs.

HARRY B. GATES and A. B. GATES, Defendants.

"Comes now Charles F. Griffin and enters his appearance as Attorney for Harry B. Gates one of the above Defendants, and the appearance of said Defendant Harry B. Gates.

CHARLES F. GRIFFIN,
Att'y for One of the Def'ts."

And afterwards to-wit: on the said 17th day of May A. D. 1893, there was filed in said Court a certain plea which is in the words and figures following to-wit:

"STATE OF INDIANA, *Cook County, ss:*

In the Circuit Court of Cook County, May Term, 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Newman & Northrup, Plaintiffs,

vs.

HARRY B. GATES and A. B. GATES, Defendants.

Plea of Non-assumpsit.

And this Defendant Harry B. Gates, by Charles F. Griffen, his attorney, comes and defends the wrong and injury, and says he did not promise in manner and form as the Plaintiffs have above thereof complained against him; and of this he puts himself upon the County etc.

CHARLES F. GRIFFIN,
Att'y for Harry B. Gates."

"STATE OF ILLINOIS, *Cook County, ss:*

In the Circuit Court of Cook County, May Term, 1893.

NEWMAN & NORTHRUP
vs.
HARRY B. GATES ET AL.

30 R. D. A. Wade makes oath and says that he verily believes that Harry B. Gates, one of the Defendants in the above entitled cause, has a good defense to this suit, upon the merits to the *to the* whole of the Plaintiffs' demands.

R. D. A. WADE."

Subscribed in my presence and sworn to before me this 17th day of May, 1893.

[SEAL.] MINNIE ZOLLINGER,
Notary Public."

Indorsed: Gen'l No. 114,714, Tenn No. 16,310. In the Circuit Court, Newman & Northrup, Harry B. Gates *et al.* Plea filed May 17th, 1893. Frank J. Gaulter Clerk. Charles F. Griffin Att'y for Harry B. Gates. Suit 113,148. Tacoma Building, Chicago."

And afterwards to-wit: on the 25th day of May, A. D. 1893, there was filed in said Court, a certain notice & affidavit in the words and figures following to-wit:

STATE OF ILLINOIS, *County of Cook, ss:*

In the Circuit Court of Cook County.

G. No., 114,714; T. No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendant-.

To Charles F. Griffin, attorney for said Defendant, Harry B. Gates:

Please take notice that on the 25th day of May, A. D. 1893, an affidavit, (a copy of which is herewith served upon you) was duly filed in said suit, and that the Clerk of said Court will place said suit on the short cause calender for Trials, as by statute made and provided.

NEWMAN & NORTHRUP,
Att'ys for Plaintiffs."

31 Dated Chicago, May 25th, 1893.

Received a copy of the foregoing notice this 25th day of May, A. D. 1893.

CHARLES F. GRIFFIN,
Att'y for Def't Harry B. Gates.

"STATE OF ILLINOIS, *County of Cook, ss:*

In the Circuit Court of Cook County.

Gen'l No., 114,714; Term No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendant-.

S. O. Levinson, being first duly sworn, deposes and says that he is one of the Plaintiffs in the above entitled cause at Law, now pending in said Court, and that he makes this affidavit for and on behalf of himself and his said Co-Plaintiffs and that he verily believes that the Trial of said suit will not occupy more than one hour's time, and therefore prays that the same be placed on the short cause calender, as by statute in such case made and provided.

S. O. LEVINSON."

"Subscribed and sworn to before me this 25th day of May, A. D. 1893.

BENJAMIN W. BECKER,
[SEAL.] *Notary Public in and for Cook County, Illinois.*

STATE OF ILLINOIS, *County of Cook:*

Gen'l No., 114,714; Term No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendants.

S. O. Levinson being first duly sworn, deposes and says that he is one of the Plaintiffs in the above entitled cause at Law now pending in said Court, and that he makes this affidavit for and on behalf of himself and his said Co-Plaintiffs, and that he verily be-
32 lieves that the Trial of said suit will not occupy more than one hour's time, and therefore prays that the same be placed on the short cause calender, as by statute in such case made and provided.

S. O. LEVINSON."

"Subscribed and sworn to before me this 25th day of May, A. D. 1893.

BENJAMIN W. BECKER,
Notary Public in and for Cook County, Illinois."

And afterwards to-wit: on the 20th day of June, A. D. 1893, the following proceedings were had and entered of Record in said Court to-wit:

No. 114,714.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES ET AL.

Assumpsit.

On the agreement of said parties *were* made now, in open Court this cause is submitted to the Court for Trial without a jury. Order June 20th, 1893."

And afterwards to-wit: on the 12th day of July, A. D. 1893, there was filed in said Court a certain appearance in words and figures following to-wit:

"STATE OF ILLINOIS, *Cook County, ss:*

Circuit Court of said County.

NEWMAN ET AL.
vs.
GATES ET AL.

"We hereby enter our appearance as Attorneys for the Plaintiffs in the above entitled cause.

WALKER, JUDD & HAWLEY."

And afterwards to-wit: on the 13th day of July, A. D. 1893, the following proceedings were had and entered of record in said Court, to-wit:

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON,
vs.
HARRY B. GATES and A. B. GATES.

Assumpsit.

33 *Order, July* 13, 1893.

This cause being called for Trial, come the parties by their Attorneys, respectively; thereupon, on motion of Plaintiffs' Attorneys, it is ordered that all papers and proceedings herein, be and they are hereby answered by discontinuing as to Defendant A. B. Gates. Thereupon, on the agreement of said parties, made in open Court, this cause is submitted to Court for Trial without a jury, and the Court now, here, after hearing all the evidence adduced and being fully advised in the premises, finds the issues for the Plaintiffs and assess their damages against Harry B. Gates to the sum of Thirteen Hundred Dollars. Thereupon, the Defendant, Harry B. Gates enters herein his motion for a new trial in said cause, after argument of counsel and due deliberation by the Court, said motion is overruled and a New Trial denied.

Therefore, it is considered by the Court that the Plaintiffs do have and recover of and from the Defendant, Harry B. Gates their said damages of Thirteen Hundred Dollars in form as aforesaid by the Court assessed, together with their costs and charges in this behalf expended, and have execution therefor.

Thereupon, the Defendant, Harry B. Gates, having entered his exceptions herein, prays an appeal from the Judgment of this Court to the Appellate Court in and for the first District of Illinois, which is allowed upon filing herein his Appeal Bond in the penal sum of Two Thousand Dollars to be approved by the Court and upon filing herein his Bill of Exceptions by September 20th, 1893."

"STATE OF ILLINOIS, *Cook County, ss:*

The people of the State of Illinois to the Sheriff of said County, Greeting:

We command you, that of the Lands and Tenements, Goods and Chattels of Harry B. Gates, Defendant, in your County, you
34 cause to be made the sum of Thirteen Hundred Dollars and —— Cents which Jacob Newman, G. W. Northrup, Jr., and S. O. Levinson, as Newman & Northrup, Plaintiffs, lately in the Circuit Court of Cook County at a Term thereof begun and held at Chicago, in said Cook County on the Third Monday of June, A. D. 1893, recovered against the Defendant, and which by the said Court, was adjudged to the said Plaintiffs for their damages. And also the further sum of Six Dollars and —— Cents which was adjudged to the said Plaintiffs for costs and charges in that behalf expended, wherefore the said Defendant is convicted, as appears to us of Record. And have you these moneys ready to render to the said Plaintiffs for their damages and costs aforesaid, and make due returns of this writ with an endorsement hereon in what manner you shall have executed the same, in ninety days from the date hereof.

Witness, Frank J. Gaulter Clerk of our said Court and the Seal thereof, at the City of Chicago in said County the 17th day of July, A. D. 1893.

[SEAL.] FRANK J. GAULTER, *Clerk.*"

Indorsements. "8680. Oct. 15th 1893. Dist. room. Circuit Court of Cook County, Execution No. 43,600, Case No. 114,714. Fee Book 60 page 133, Date July 17th 1893. Jacob Newman *et al. vs.* H. B. Gates, *et al.* Damages $1300.00, Plaintiffs' costs $6.00. Defendants' costs $1306.00 The sheriff will collect interest from July 13th 1893 and pay Plaintiffs' Attorneys. Frank J. Gaulter Clerk. Newman & Northrup Att'ys. Rec'v'd 3.15 o'clock p. m. July 17, 1893, James H. Gilbert Sheriff. Pd. 10. The
35 within named Defendant and no property of the within named Defendant found in my County on which to levy this writ. I therefore return the same, "No property found and no part satisfied, this 15th day of October 1893. James H. Gilbert, sheriff, by Samuel E. Emekse, deputy."

"UNITED STATES OF AMERICA,
State of Illinois, Cook County:

I, Frank J. Gaulter, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify that I am the Keeper of the Records and Files of said Court, and that the above and foregoing is a true, perfect and complete, Transcript of the Record together with the Execution and Return thereon in a certain cause pending in said Court on the common Law side thereof between Jacob Newman *et al.*, Plaintiffs and Harry B. Gates *et al.* Defendants.

In Witness whereof, I have hereunto set my hand and affixed

the Seal of said Court at Chicago, in said County, this 20th day of April A. D. 1894.

[SEAL.] FRANK J. GAULTER, *Clerk.*

STATE OF ILLINOIS, *County of Cook,* ss:

I, M. F. Tuley, Chief Justice of the Circuit Court of Cook County, in the State of Illinois, hereby certify that Frank J. Gaulter, who signed the above Certificate, was at the time of signing the same, and is now Clerk, of the said Circuit Court of Cook County duly commissioned and qualified; that said Court is a Court of Record having a Clerk and Seal; that said attestation is in due form
36 and by the proper officer according to the laws of the State of Illinois and that the above signature of said Clerk is genuine.

Witness, my hand and Seal at Chicago in said County of Cook, this 20th day of April 1894.

[SEAL.] M. F. TULY,
Chief Justice of the Circuit Court of Cook County.

STATE OF ILLINOIS, *County of Cook,* ss:

I, Frank J. Gaulter, Clerk of the Circuit Court of Cook County, in the State of Illinois (said Court being a Court of Record), do hereby certify that the Hon. M. F. Tuley, whose name is subscribed, to the annexed and foregoing certificate was at the time of the signing thereof and now is Chief Justice of said Circuit Court, duly elected, commissioned and qualified and that his said signature is genuine.

In Witness whereof, I have signed my name and affixed the Seal of said Circuit Court, at my office, in the City of Chicago, in said Cook County this 20th day of April 1894.

[SEAL.] FRANK J. GAULTER, *Clerk.*"

That said cause proceeded to Trial and judgment as aforesaid upon the general issue; that by express provision of the statutes of the State of Illinois, section three, Chapter 76, Illinois Annotated Statutes, it is declared that all joint obligations are joint and several.

That the Statute of Illinois, being Section 23 of the Practice Act, Hurd's Revised Statute of Illinois, page 1014, provides that: "At any time before final judgment in a Civil suit, amendment
37 may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as Plaintiff or Defendant, discontinuing as to any joint Plaintiff or joint Defendant, changing the form of action, and in any matter, either of form of substance in any process pleading, or proceeding which may enable the Plaintiff to sustain the action for the claim which it was intended to be brought, or the Defendant to make a legal defense. The adjudication of the Court allowing an amendment shall be conclusive evidence of the identity of the action.

The Statutes of Illinois further provide, Chapter 7, Amendments and Jeofails, (Hurd's Revised Statutes of Illinois page 136), that

"Judgment shall not be arrested and stayed after verdict, nor shall any judgment upon verdict or first finding by the Court or upon confession *nil dicet.* or *non sum informatus* or upon any unit of inquiry of damages, be revised, impaired, or in any way affected, by reason of the following inperfections, pleadings, proceedings or record viz:

Fourth. For any variance between the original writ or process and the declaration, bill, petition, plaint or demand.

Fifth. For any mispleading, insufficient pleading, lack of color, or miscontinuance, discontinuance or misjoining of the issue or want of the joinder of the issue."

By the Law of the State of Illinois, where an action of assumpsit is brought against two Defendants, the Plaintiff may dismiss his action as to one of the Defendants, and the cause will then be proceeded in, as a suit against the remaining Defendant as upon a several promise, and judgment may be rendered against said Defendant, and the amendment may be made after judgment as well as before judgment.

It is further the Law of the State of Illinois that in an action in assumpsit for the value of work and labor performed or services rendered, under the general issue, the Defendant may prove
38 any and all facts which would entitle him to damages against the Plaintiff for the negligent or wrongful manner in which he performed such services, and may, under the general issue in such an action, recoup any damages to which he may be entitled by reason of the negligence or misconduct of the Plaintiff in rendering such services or in failure to render such services.

Plaintiffs further say that the action aforesaid, in the Circuit Court of Cook County was brought by the said Plaintiffs against the said Harry B. Gates to recover compensation for legal services and disbursements rendered by the Plaintiffs for the said Harry B. Gates in and about the same matters and litigations mentioned and described in the said Counter-Claim in the said Third Paragraph of the Defendant's Answer herein, and for no other or further or different matters, things or causes of action and that the said Harry B. Gates personally appeared in said Circuit Court of Cook County, Illinois, in open Court, and defended against said claim of said Plaintiffs therein on the trial thereof, and claimed on said trial, in his own behalf that said Plaintiffs were not entitled to recover against him, the said Harry B. Gates, on the ground that the services rendered by the Plaintiffs to him the said Harry B. Gates, were of no value, by reason of negligence and misconduct of the Plaintiffs therein and that he said Harry B. Gates was not liable to the Plaintiffs in said cause of action, because of these facts, and because of the fact that he had suffered damage by reason of the said negligence and misconduct of the Plaintiffs, and that said damage, exceeded the sum claimed by the Plaintiffs for their services and disbursements.

That the said Harry B. Gates on said trial offered evidence to-wit:
his own testimony and other evidence, in support of his said
39 claim that the services of said Plaintiffs were so worthless and harmful to him and had caused him the said damage.

And Plaintiffs further say, that the said claim and defense of the said Harry B. Gates so made in said action in Cook County, Illinois, is the identical claim and defense attempted to be set up by the said Defendant in said third paragraph of his said Answer, and that the services, matters and litigations for which the Plaintiffs recovered their said judgment in said Cook County were the very same, identical services, matters and litigations in respect to which said Harry B. Gates claims in the said third paragraph of his said answer that the said Plaintiffs were negligent and misconducted themselves as Attorneys, and in respect to which he claims he suffered damage by reason of the negligence and misconduct of the Plaintiffs and no other or further or different matters, services or litigations.

And the Plaintiffs further say that the said Circuit Court on said trial, heard and considered the said claim of the said Harry B. Gates made on said trial, and heard and considered the evidence offered by the said Harry B. Gates in support thereof.

Wherefore by reason of the foregoing, the Plaintiffs say that the matters and things set forth and the cause of defense or Counter-claim, set up in said Counter Claim or third paragraph of Answer, have been adjudicated as between the Defendant and these Plaintiffs by the former judgment of the Circuit Court of Cook County, hereinbefore set forth, and that the Defendant is estopped to set up said Counter-Claim as against the judgment set forth in the complaint.

CHARLES MARTINDALE,
Att'y for Plaintiffs."

Par. 2. For a second and further paragraph of Reply to the third paragraph of the Defendant's Answer, the Plaintiffs say that they deny each and every material allegation therein contained.

40 CHARLES MARTINDALE,
Att'y for Plaintiffs."

And afterwards to-wit: on the 10th day of November 1894, being the 6th Judicial day of the said November Term of this Court, before the same Honorable Judge, the following proceedings were had herein:

"Comes now the Defendant by counsel and files his affidavit of non-residence of the Plaintiffs herein, as follows:

"STATE OF INDIANA, *County of Marion, ss:*

Marion County Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE NORTHRUP, S. O. LEVINSON, Plaintiffs,
vs.
HARRY B. GATES.

Affidavit for Security for Costs.

Harry B. Gates, being duly sworn, on his oath says, he is the Defendant in the above entitled cause, and that the Plaintiffs are non-residents of the State of Indiana.

HARRY B. GATES."

Subscribed and sworn to before me, the undersigned, a Notary Public in and for said County and State, this 10th day of November, 1894.

EDWARD E. GATES,
[SEAL.] *Notary Public, Marion County.*"

"And the Court having examined said affidavit and being fully advised in the premises sustains the same.
It is therefore, Ordered by the Court, that the Plaintiffs file their Cost Bond herein."

41 And afterwards, towit: on the 15th day of December, 1894, being the 12th Judicial day of the December Term 1894 of said Court, before the same Hon. Judge, the following proceedings were had herein, viz:
"Come now the Plaintiffs by counsel and file their Cost Bond herein with Charles Martindale as surety, as follows viz:

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Cost Bond.

We undertake to pay the costs chargeable on the above entitled cause, without relief of valuation.
Witness our hands and Seals this 8th day of December, 1894.

JACOB NEWMAN.
G. W. NORTHRUP, JR.
S. O. LEVINSON.
CHARLES MARTINDALE.

Approved, Dec. 15th, 1894.
"And the same is approved by the Court."

And afterwards, to-wit: on the 8th day of March 1895, being the 5th Judicial day of the said term of this Court, the following proceeding was had herein, viz:
"This cause is now transferred to the General Term of said Court for re-assignment."
Assigned to Room 1 for Trial.

And afterwards, to-wit: on the 20th day of March 1895, being the 15th Judicial day of the March Term aforesaid, of said Superior Court, before the Hon. John L. McMaster, Judge presiding in said Room One (1), the following proceeding was had herein.

"Come now the Plaintiffs by counsel, and upon their mo-
42 tion the Depositions of Charles S. Cutting, Edward B. Tol-
man and Charles Whitney are, by Order of the Court, published."

And afterwards, to-wit: on the 4th day of April 1895, being the 4th Judicial day of the April Term, 1895, of said Court before the same Hon. Judge, the following proceedings were had herein, viz:

"Come now the parties in person and by counsel, and this cause being at issue and called for Trial, is, at the request of the parties, submitted to a jury*m* as follows: Anton Wiese, Jesse Wright, W. G. McCabe, Michael Condron, Robert Thompson, Harry Smith, William McCray, Henry Pence, John S. Stout, John Lavery, Theodore Badger, and Lewis W. Ritter. Twelve (12) good and lawful men, resident householders or free holders of Marion County, Indiana, who are duly empanelled and sworn to try the matters at issue herein. And a portion of the evidence having offered the Trial herein is adjourned until tomorrow morning at nine o'clock, to which time the jurors of the said jury are permitted to separate under the admonition of the Court."

And afterwards, to-wit: On the 5th day of April, 1895, being the 5th Judicial day of the April Term 1895 of said Court, before the same Hon. Judge, the following proceedings were had herein:

"Come again the parties in person and by counsel, and come also the jurors of the jury aforesaid and the investigation of this cause is now resumed.

And the evidence being concluded and the jury having been instructed, as follows:

43 "STATE OF INDIANA, *Marion County, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Instructions of the Court.

The Court instructs you to return a verdict in favor of the Plaintiffs, and to assess the amounts due them at the amount of the Judgment rendered in their favor against the Defendant in the Circuit Court of Cook County, Illinois, with five per cent. interest thereon from the date of rendition thereof to this date.

JOHN L. McMASTER, *Judge.*"

"Given and excepted to by Defendant this 5th day of April, 1895.

JOHN L. McMASTER, *Judge.*
BAKER & DANIELS,
Att'y. for Def't."

"And the jurors now without retiring, return their verdict in accordance with the instructions of the Court, as follows:

"We the jury find for the Plaintiffs and assess their damages at the sum of $1410.98.

HARRY C. SMITH, *Foreman.*"

And afterwards to-wit: on the 25th day of April 1895, being the 22nd Judicial day of the April Term 1895 of said Court before the same Hon. Judge, the following proceeding was had herein, viz:

"Comes now the Defendant by counsel, and files his motion for a new trial herein in the words and figures following, viz:"

"STATE OF INDIANA, *County of Marion, ss:*

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Motion for New Trial.

The Defendant, Harry B. Gates, in the above entitled cause
44 moves the Court for a New Trial thereof, on the following grounds and each of them, to-wit:

"That the Court erred in admitting in evidence, over the objections of the Defendant, the Transcript of the Record, together with the execution and return thereunder, in a certain cause pending in the State of Illinois on the Common Law side, of an alleged judgment, purporting to have been rendered in the Circuit Court of Cook County Illinois, on the 13th day of July 1893, wherein Jacob Newman, George Northrup Jr. and S. O. Levinson were Plaintiffs and Harry B. Gates and A. B. Gates were Defendants.

2. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness, S. O. Levinson, on direct examination, to-wit:

"I assume that you have knowledge of all the matters in this Record, submitted in evidence by the Plaintiffs: that you have knowledge of the services rendered by Chas. F. Griffin and Olds & Griffin, as the attorneys of Defendant, Harry B. Gates in the suit in the Circuit Court of Cook County, Illinois: and upon the assumption that you have knowledge of all those facts, and that they are in this question, I will ask you to state what would be a reasonable fee for the professional services rendered by Chas. F. Griffin and Olds & Griffin in that cause."

And in excluding from the jury the evidence of the said Levinson, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts to-wit:

That the services referred to were worth $150.00

3. That the Court erred in sustaining the Plaintiffs' objection to

the following question propounded by the Defendant to his witness Harry B. Gates, a witness in his own behalf on direct examination.

45 "Now I will ask you what, if any, information did the Plaintiffs or any one of them, at the time referred to in your last answer, or at any time subsequent thereto, give you that it was necessary under the Law of Illinois, in order to bind the Trust Estate, for the compensation of themselves as the attorneys for you as Trustee, to procure an Order of Court authorizing their employment as such attorneys."

And in excluding from the jury the evidence of the said Harry B. Gates by his answer to said question, propounded as aforesaid, by whom said Defendant offered to prove the following facts, to-wit: That the Plaintiffs did not inform the Defendant that it was necessary to procure an Order of the Lake County Court in order to bind the Trust Estate.

4. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness, Harry B. Gates, a witness in his own behalf, on direct examination, to-wit:

"You may state whether you personally, or the Plaintiffs as your attorneys, as Trustee, ever appeared before the Lake Circuit Court during the pendency of the assignment of the American Mortar Company, and presented a Petition from you asking the Lake Circuit Court to make an Order*ed* authorizing the employment of the Plaintiffs as attorneys."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant, offered and proposed to prove the following facts, viz: that neither himself nor any of the Plaintiffs as his attorneys so appeared.

5. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness Harry B. Gates, a witness in his own behalf, on direct ex-

46 amination, to-wit:

"I will ask you to state whether upon that effort to make a sale the assets of the Mortar Company were knocked off and sold for the sum of $5,200.00 to two bidders by the name of Howard and Burrows?"

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts: That the assets of the Motar Company were knocked off and sold for the sum of $5,200, to two bidders by the name of Howard and Burrows.

6. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to the witness Harry B. Gates, a witness in his own behalf on direct examination.

"I will ask you to state whether the next highest bid to the one made by Howard & Burrows referred to in the last preceeding question, was $5000 and made by one named O'Brian."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts to-wit: that O'Brian did make the next highest bid in the sum of $5,000, before Howard & Burrows made their bid for which the property was knocked off to them.

7. The Court erred in sustaining the Plaintiffs' Objection to the following question, propounded by the Defendant to his witness Harry B. Gates, a witness in his behalf, on direct examination, to-wit:

"If the O'Brian referred to in the last preceeding question was financially responsible and able to pay the $5,000, you may so state."

And in excluding from the jury the evidence of the said
47 Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts to-wit:

"That O'Brian was financially responsible and able to pay the amount of his bid $5,000.00."

8. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness, Harry B. Gates, a witness in his own behalf, on direct examination, to-wit:

"I will ask you to state whether the sale to Howard and Burrows was consum-ated by an order of the Court confirming the sale."

And in excluding from the jury the evidence of said Harry B. Gates by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

"That the sale to Howard and Burrows was not consum-ated."

9. The Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness Harry B. Gates, a witness in his own behalf, on direct examination, to-wit:

"You may state whether or not the sale to Howard & Burrows to you as Trustee, referred to in the last preceeding question, was in fact reported to the Court having jurisdiction of the said assignment?

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

That it was not so reported.

10. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his
48 witness Harry B. Gates, a witness in his own behalf, on direct examination, to-wit:

"You may state why the sale to Howard & Burrows referred to in the last preceeding question, was not reported to the Court."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

That such sale was not reported to the Court because the bidders did

not make good their bid by a deposit of cash, and they were in effect "straw bidders."

11. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant, to the witness, Gates, a witness in his own behalf, on direct examination.

"I will ask you to state whether or not Howard & Burrows were not bidding at such sale in the interest of Newman, Northrup and Levinson, who were to furnish the purchase money upon the bid."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

That Howard & Burrows as such bidders, were acting in the interest of Newman, Northrup & Levinson, the Plaintiffs in this cause; and that said Newman, Northrup & Levinson were to furnish the money for the purchase in the consum-ation of said sale.

12. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness, Harry B. Gates a witness in his own behalf, on direct examination, to-wit:

49 "You may state whether after Howard & Burrows failed to make good their bid by deposit of cash, upon the advice of Newman, Northrup and Levinson, you made a second offer of the assets of the American Mortar Company for sale at Waukegan."

And in excluding from the jury the evidence of said Harry B. Gates, by his answer to said question, propounded as aforesaid Defendant offered and proposed to prove the following facts, to-wit: That under the advice of Newman Northrup and Levinson, as his attorneys as such Trustee, he did make such second offering for sale of the assets of the American Mortar Company."

13. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant, to his witness Harry B. Gates, a witness in his own behalf on direct examination, to-wit:

"I will thank you to state whether upon such offering one O'Brian, who had bid $5,000, on the first offering, made a bid."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question, propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

That O'Brian did make one bid at such second offer.

14. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness Harry B. Gates, a witness on his own behalf, on direct examination, to-wit:

"If thereafter the said O'Brian refused to make any further bid at said offering, and gave his reason therefor, you may so state, giving his reason."

And in excluding from the jury the evidence of said Harry B. Gates by his answer to said question, propounded as aforesaid, by

whom said Defendant offered and proposed to prove the following facts, to-wit:

50 That the said O'Brian did refuse to make a second bid upon such second offering, and gave as his reason the fact that the Trustee's attorneys, Newman, Northrup and Levinson were bidding at said sale, and that he would not bid against him."

15. That the Court erred in sustaining the Plaintiffs' objection to the following question propounded by the Defendant to his witness Harry B. Gates, a witness in his own behalf, on direct examination:

"You may state whether upon such second offering of the assets of the American Mortar Company for sale, such assets were knocked off and sold, and give the name of the purchaser."

And in excluding from the jury the evidence of said Harry B. Gates, by his answer to said question as propounded, by whom said Defendant offered and proposed to prove the following facts, viz: That the assets and property of the American Mortar Company at such second offering, were knocked off and sold to S. O. Levinson, one of the Plaintiffs in this case, for the sum of $3,000.00.

16. That the Court erred in sustaining the objection of Plaintiffs to the following question propounded by the Defendant to his witness, Harry B. Gates, a witness in his own behalf, on direct examination:

"You may state whether or not, as Trustee of the American Mortar Company, you received any compensation for your services, or any reimbursement for outlays, as such Trustee, made on behalf of the Estate."

And in excluding from the jury the evidence of the said Harry B. Gates, by his answer to said question propounded as aforesaid, by whom said Defendant offered and proposed to prove the following facts, to-wit:

That he received no compensation and no reimbursement for outlay or cash expended.

51 17. That the Court erred in giving the following instruction to the jury, to-wit:

"Gentlemen of the jury, the Court instructs you to return a verdict in favor of the Plaintiffs and assess the amount due them at the amount of the Judgment rendered in their favor against the Defendant, in the Circuit Court of Cook County, Illinois, with five per cent. interest thereon from the date of the rendition thereof to this date."

BAKER & DANIELS,
EDWARD E. GATES,
Att'ys for Defendant."

And afterwards, to-wit: on the 24th day of September, 1895, being the 21st Judicial day of the September Term, 1895, of said Court before the same Hon. Judge, the following proceedings were had herein, viz:

"Come the parties and the Court being sufficiently advised in the premises, does now overrule the Defendant's motion for a New Trial

herein, to which ruling of the Court the Defendant at the time, excepts and is given sixty (60) days to file his Bill of Exceptions.

And now the Defendant presents his Bill of Exceptions which is signed and filed and by order of the Court made a part of the Record in this cause and is as follows, viz:"

Not on file.

52 And afterwards to-wit: on the 4th day of October, 1895, being the 29th Judicial day of the September Term, 1895, of said Court before the same Hon. Judge the following proceedings were had herein, that is to say:

"Come the parties by Counsel and the jury having returned a verdict herein, the Court now renders Judgment thereon:

It is therefore considered, Adjudged and Decreed by the Court that the Plaintiffs do have and recover of and from the Defendant the sum of Fourteen Hundred and Fifty Dollars ($1450) together with their costs herein, taxed at $—. And the Defendant now prays an Appeal to the Appellate Court of Indiana, which is granted conditioned on his filing an Appeal Bond in the sum of $2200.00, and thirty (30) days are given in which to file the same."

March 31, 1897.—Notice received of the Reversal, by the Appellate Court of the foregoing Judgment.

And afterwards, to-wit: on the 4th day of December, 1899, being the fifth Judicial day of the December Term, 1899, of the said Court before the same Hon. Judge, the following proceedings were had herein:

"Come the parties by counsel and the Defendant presents a certified copy of the opinion of the Appellate Court, showing the Reversal of this cause, and now on the Defendant's motion said cause is re-docketed in this Court.

And the Defendant now withdraws his First Paragraph of Answer filed herein.

And this cause being called for Trial is submitted to a jury as follows:

Talbert Moore, Louis W. Tully, Henry Vauter, Albert L. Kerr, Robert Collins, Frank Hilgemier, J. Bolsley, John Trost, Jr., John Crane, Henry Bond, Charles A. Culbertson and W. H. Hollingsworth, Twelve (12) good and lawful men, resident house-
53 holders or free holders of Marion County, Indiana, who are duly empaneled and sworn to try this cause.

And before introducing any evidence, the Plaintiffs move the Court for leave to amend the Complaint herein, which motion is in words and figures following, viz:

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Amendment of Complaint.

The Plaintiffs move the Court to amend the Complaint by inserting therein and in lieu of the *ad damnum* clause therein the following:

That under the Laws of the State of Illinois said Judgment bears interest at the rate of five (5) per cent. per annum, from the date of the rendition thereof and that there is due and unpaid on said judgment, interest and costs the sum of eighteen hundred dollars ($1800).

Wherefore, Plaintiffs pray Judgment against the Defendant for the sum of Eighteen Hundred Dollars ($1800), together with their costs herein.

W. A. KETCHAM.
CHAS. MARTINDALE."

"And the Court, on consideration, grants said motion and the amendment prayed for in said motion is allowed.

Thereupon, this cause is now submitted and part of the evidnece heard, and there not being time to complete the hearing the jury is admonished by the Court and permitted to separate until to-morrow morning at nine-o'clock until which time further proceedings herein are continued."

54 And afterwards, to-wit: on the 5th day of December, 1899, being the 2nd Judicial day of the December Term 1899 of said Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come again the parties and come also the jurors impaneled in this cause and the Trial thereof is resumed. And further evidence being heard the jurors are permitted to separate under the usual admonition of the Court."

And afterwards, to-wit: on the 6th day of December, 1899, being the 3rd Judicial day of the December Term aforesaid, of this Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come again the parties and come also the jurors aforesaid, and the Trial of this cause is resumed. Further evidence being heard and there not being time to complete the same, the jurors

are admonished by the Court and permitted to separate until to-morrow morning at nine o'clock, to which time further proceedings herein are continued."

And afterwards, to-wit: on the 7th day of December, 1899, being the 4th Judicial day of the said December Term of this Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come again the parties and come also the jurors aforesaid and the Trial of this cause is resumed. And the evidence adduced being heard, the Plaintiffs submit to the Court certain Instructions directing the jury to return a verdict for the Plaintiffs, as follows, viz:

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

55 *Plaintiffs' Request for Instructions.*

The Plaintiffs request the Court to instruct the jury as follows:

As to the issue made by the Cross-Complaint herein, that it is the Law of the State of Illinois that an Assignee who employs counsel to advise him and look after matters connected with the administration of his Trust, in order to charge the Trust Estate with the fees of such counsel, must before employing such counsel, obtain an Order of Court authorizing him to employ such counsel, and that such an Order absolves the Assignee from personal liability for such attorneys' fees, the Court instructs you, that there is no conflict in the evidence. All the evidence offered by Defendant as well as by Plaintiffs, shows that such is not the Law of the State of Illinois, and as to that issue, it is your duty to find with the Plaintiffs that the Plaintiffs were not guilty of any negligence in failing to obtain such an Order in advance of their employment or subsequent to their employment, and were not guilty of any negligence in failing to advise Defendant that such was the Law.

As to the issue made by the Reply to the Counter-Claim of Defendant, that the alleged misconduct of Plaintiffs in bidding at the sale of the assets of the American Mortar Company, which misconduct it is alleged resulted in preventing money from coming into the hands of the assignee out of which he could have reimbursed himself for counsel fees and other expenses of the administration of his Trust, it was presented by the Defendant as a Defense in the action brought by Plaintiffs in the Circuit Court of Cook County, Illinois, wherein they recovered the Judgment sued upon in this action, and that said matters have been adjudicated as between these

parties, the Court instructs you that there is no conflict in the evidence as to said issue of former adjudication, all the evidence of both
parties showing that the said matters were presented by way
56 of defense in said action in Cook County, Illinois, and it is
your duty to find this issue in favor of the Plaintiffs.

These two issues control this case, and there being no conflict in the evidence in relation thereto, the Court instructs you to return a verdict for the Plaintiffs for the amount of their Judgment Thirteen Hundred Dollars ($1300.) with the interest thereon at the rate of five per cent. per annum from the date thereof, July 13, 1893, to this date, with costs in said action, Six ($6) dollars added.

The form of your verdict will be, "We the jury, find for the Plaintiffs and assess their damages at — Dollars. —— ——, Foreman.

"Refused and Excepted — this 7th day of December 1899.

JOHN L. McMASTER, *Judge.*"

W. A. KETCHAM,
CHAS. MARTINDALE,
Att'ys for Plaintiffs."

"Thereupon the jurors are excused until to-morrow morning at 9 o'clock, to which time further proceedings herein are continued."

And afterwards, to-wit: on the 8th day of December, 1899 being the 5th Judicial day of the December Term, 1899 of said Court before the same Hon. Judge, the following proceedings were had herein:

"Come the parties and the Court now overrules the Plaintiffs' motion for Instruction requiring the jury to return a verdict for Plaintiffs, to which ruling of the Court the Plaintiffs except.

And the Plaintiffs and the Defendant each now submit to the Court Instructions, with the request that the same be given to the jury.

And come now also the jurors impaneled in this cause and
57 *and* part of the argument is heard, and there not being time
to complete the same, further proceedings are continued until to-morrow morning at nine o'clock to which time the jurors are permitted to separate under the usual admonition of the Court."

And afterwards, to-wit: on the 9th day of December 1899, being the 6th Judicial day of the December Term 1899, of the said Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come again the parties and come also the jurors aforesaid and the Argument of counsel is resumed and concluded; and the jury is instructed by the Court, and retire to consider of their verdict, in charge of the Bailiff of this Court duly sworn as such.

And the instructions asked by the Plaintiffs and refused by the Court, and the instructions asked by the Defendant and also refused, and the instructions given by the Court, together with all Exceptions are now filed and made part of the Record herein, and are in the words and figures following:"

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE W. NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Plaintiffs' Instructions.

The Plaintiffs request the Court to instruct the jury in writing as follows:

1. This is an action brought by Jacob Newman Geo. W. Northrup Jr. and S. O. Levinson, partners, against the Defendant, Harry B. Gates, and the Plaintiffs allege as their cause of action in the complaint, that on the 13th day of July, 1893, they re-
58 covered a judgment against the Defendant for the sum of Thirteen Hundred Dollars ($1300) in the Circuit Court of Cook County Illinois; that said judgment together with the costs thereon, is unpaid and is still in force, and that there is due and unpaid thereon the sum of said judgment.

The Defendant admits the allegation of said complaint and you should enter upon your deliberations with the conviction that as to the amount of the judgment, Thirteen Hundred Dollars ($1300) together with interest thereon from July 13th, 1893, at the rate of five per cent. per annum, the whole amounting to Seventeen Hundred and Fifteen Dollars and Twenty-six Cents ($1715.26) it stands admitted upon the Record that such amount is due to the Plaintiff- on their complaint, and the question for you to determine is whether the whole or any part of the amount alleged to be due to Defendant upon his counter claims is due to him and if so, how much?

2. The Defendant has filed a counter-claim in which he alleges that prior to the first day of September, 1892, there was in existence a corporation organized under the Laws of the State of Indiana under the corporate name of The American Mortar Company which corporation had been engaged in business in the City of Chicago and owned a plant, including real estate and boats, located in the City of Waukegan, Illinois; that said corporation had become financially embarrassed and the stockholders had decided to make a statutory assignment for the benefit of creditors: that Alfred B. Gates, the President of the corporation, and Harry B. Gates, the Defendant, who was in no wise connected with the American Mortar Company, went to the office of the Plaintiffs Newman, Northrup & Levinson, in Chicago, and employed the Plaintiffs as attorneys to attend to the legal matters necessary to perfect a statutory assign-
ment for the benefit of the creditors by said American Mortar
59 Company, and directed that the assignment should be made to Harry B. Gates, Defendant as Trustee; the assignment was

made to Harry B. Gates or assignee and he filed his Bond and qualified as such assignee; that the Defendant Harry B. Gates, requested the Plaintiffs, Newman Northrup & Levinson, to look after, direct and control all legal matters of whatsoever kind and nature, which would be necessary and proper for him, as such Trustee, to have looked after by competent Lawyers; that the Plaintiffs superintended the preparation of Inventories, the procuring of Orders for the sale of the property and rendered other legal services affecting the said Trust to the Defendant, Harry B. Gates, as Trustee, and the Defendant relied solely upon the advice and counsel of the Plaintiffs as his attorneys in the management of said Trust, with this exception, that sometime after he had qualified as such Trustee the Plaintiffs Newman, Northrup & Levinson employed a firm of lawyers at the city of Waukegan to act with them in matters connected with said Trust coming up in the Circuit Court of Lake County, Illinois, held at the City of Waukegan.

The Defendant further alleges that it is the law of the State of Illinois that a Trust Estate could only be made liable for the payment of legal services rendered to a Trustee of such Trust by a formal Order of Court authorizing the employment of a lawyer for the rendition of such services.

He further alleges that he was a laymen and did not know such to be the Law, and that it was the duty of Newman, Northrup & Levinson to have so informed him and to have procured such an Order to be made: that by reason of the fact that no such Order was obtained the Defendant, Harry B. Gates, became personally liable to Newman Northrup & Levinson for their fees due them for services rendered to him as Trustee, and that if the said Order had been procured he would not have been so personally liable; that by reason of their failure and neglect to obtain such an Order so
60 that Harry B. Gates would not be personally liable for their attorneys' fees, they were guilty of a breach of their duty and obligation to Harry B. Gates as his attorneys and that he has by reason of such breach of their duty to him been damaged in a sum equal to the amount of judgment which they obtained against him for their fees, together with the amount of his attorneys' fees and expenses connected with the suit in which Newman, Northrup & Levinson obtained judgment against said Harry B. Gates in the Circuit Court of Cook County, Illinois, and together with the costs, and expenses of this action, all of which items it is alleged, amount to over Two Thousand Dollars ($2000.00).

3. The Defendant also alleges in his counter-claim against the Plaintiffs that the sale of the assets of the American Mortar Company by the said Defendant Gates as Assignee or Trustee, was made on the 18th day of April, 1893, and that the Defendant, Harry B. Gates, proceeded to cry the sale at public outcry; that bids were received from several persons; that the highest bid for the property was for Fifty-three Hundred Dollars ($5300.) and that the bid next before the last bid was made by one O'Brien, who was financially responsible and ready to make good his bid; that the parties making the highest bid communicated by telephone with Newman & North-

rup in the City of Chicago, said sale being made at Waukegan, requesting Newman & Northrup for leave to draw upon them for the amount of cash payment necessary to make good their bid; that this authority to draw on them was refused by Newman and Northrup and the parties withdrew their bid; that Levinson who was in attendance on the sale and advising the Defendant, Harry B. Gates, advised Gates that he must at once re-offer the assets for sale which he proceeded to do: that O'Brien who had made the next to the last bid on the first sale, was again a bidder and that said Levinson, who was there as the attorney for Gates also bid for the property;
61 that O'Brien challenged the right of Levinson to bid because he was the attorney for the Trustee and refused to bid against Levinson; that Levinson bid Three Thousand Dollars ($3000) for the assets and advised the Defendant Gates as Trustee, that the sale of the assets must be made to Newman & Northrup for whom he was bidding, and the Defendant Gates as Trustee, acting upon Levinson's advice, struck off the property to Newman & Northrup and received from them a check upon a Chicago Bank in payment for their bid; that the sale was reported to the Circuit Court having jurisdiction of the assignment, but before the same was approved by the Court, the fact developed that the mortgagee of all the property of the American Mortar Company, being the assets offered for sale had in pursuance to Law taken possession of the property and was holding the same as against the said Trustee and the purchasers at said sale, and upon this showing the Circuit Court set aside the sale and released Newman & Northrup from their bid; that afterwards the mortgagee procured the consent in writing, of the American Mortar Company and of a majority of its creditors in number and amount, and in pursuance of a statute of the State of Illinois permitting the same to be done, had the assignment proceedings discontinued which discontinuance took all the assets out of the possession of the assignee and left him no property or assets out of which he could pay the expenses of said assignment, including the fees of Newman, Northrup & Levinson and his own claims for compensation and cash advanced; that if it had not been for the fact that Newman & Northrup bid at said sale O'Brien would have bid in the property for Five Thousand Dollars ($5000) and would have completed the purchase and the Trustee would have had ample funds to pay the fees of Newman, Northrup & Levinson Plaintiffs, his own compensation and the expenses of the Trust; that the bidding of Newman & Northrup at said sale, was a breach of their duty and obliga-
62 tion to the Defendant, Harry B. Gates, as his attorneys, and that by reason thereof, he had been damaged in the sum of Twenty-five Hundred Dollars ($2500).

4. The burden is upon the Defendant, Harry B. Gates to prove the allegations of his counter-claim and unless he does prove one or more of the issues set forth in his counter-claim, by a preponderence of the evidence your verdict must be for the Plaintiffs for the amount of Plaintiffs' judgment and costs with interest thereon, as hereinbefore set forth.

5. As to all matters embraced in the Defendant's Answer of

counter claim based upon or growing out of the alleged misconduct or violation of duty by the Plaintiffs at the sale, I instruct you that upon the undisputed evidence in this case, all such matters were submitted at the Trial in which the Plaintiffs obtained the judgment sued on, and that it is the un*un*questioned Law in Illinois, that, having been so submitted, the Defendant cannot be heard thereafter to set up such matters, or any of them by way of an original cause of action or by way of a counter-claim or set off in this action. All these matters having been adjudged by a Court of Competent jurisdiction, both as to the subject matter of the action and the person of the Defendant, and therefore, upon this issue your finding should be for the Plaintiffs, and in whatever form such averments of the Third Paragraphs of the Defendant's Answer may come before you for your consideration upon any issue, you should take it as conclusively settled that the Defendant has in this action no right to complain and cannot be heard to say that there was any misconduct or breach or neglect of duty by the Plaintiffs in connection with the sale of said assets by the assignee, that will in any wise, afford the basis of a complaint in favor of the Defendant against the Plaintiffs.

6. In determining whether or not the Defendant can re-
63 cover by reason of any alleged breach of duty on the part of the said Plaintiffs in their failing to obtain an Order from the Court authorizing the employment of counsel and relieving him from personal liability, I now instruct you that it is the Law of Illinois, as shown by the testimony in this case, that it is not necessary for an assignee or for his attorneys to obtain an Order of Court in the outset, authorizing the employment of such attorneys, but that upon all the evidence in this case there is no conflict on that question, it being agreed by all the witnesses, that the obtaining of such an Order in the outset, or at any time prior to the final settlement of the assignee's accounts is unnecessary; and I also instruct you in this connection, that it is the Law of Illinois, as settled evidence in this case, that there is no conflict in the evidence that such is the Law of Illinois. That had an Order been obtained authorizing the assignee to employ attorneys, the entry of such an Order would not have relieved the assignee from personal liability to the Plaintiffs for their attorneys' fees. In considering therefore, the issue tendered upon the said alleged neglect of duty by the Plaintiffs in failing to obtain such order, you should consider that it is the settled Law of Illinois that the said Plaintiffs were not compelled to obtain such an Order, and that there was no legal duty resting upon them to obtain any Order of that character at any time prior to the final settlement of the Defendant's accounts as assignee, and that in no event, under the issues in this case, are you at liberty to consider that the Plaintiffs had been guilty of any neglect of duty, which at the time of the final settlement of the Defendant's accounts as the assignee the Plaintiffs were still acting as his attorneys and he was relying upon them as such, and they knew that he was so relying, and that, so knowing, they at that time failed or neglected to make provision for
64 his allowance in connection with the final settlement of his accounts, and even in that event, the Plaintiffs would not be liable unless at the time, there were sufficient assets in the

estate out of which the Court might make an allowance to re-imburse the assignee for his expenses and costs, including the amount due to his attorneys.

If therefore, you should find from the evidence that at or about the time of the sale by the assignee of the assets of said estate the Plaintiffs had ceased to be his attorneys, and at that time the assignee was still in possession of the property that had been assigned to him, and if thereafter, by an Order of Court the said assignment was terminated under the statutes of Illinois, at a time when the Plaintiffs were not acting as the Defendant's attorneys, and he knew or had reasonable cause to know that they were not so acting, your verdict upon this issue, should be for the Plaintiffs.

"Refused and excepted to by the Plaintiffs this 9th day of December, 1899.

JOHN L. McMASTER, *Judge.*"

7. There is no conflict in the evidence upon the question but that immediately following the sale, the relationship of attorney and client between the Defendant and the Plaintiffs had terminated. There is no question upon the evidence, but that at some time prior to the 26th day of April, such relationship no longer existed, and there is no controversy on the evidence over the time when the proceedings in the assignment were discontinued. It is shown by the Record that that took place on the 16th day of May 1893, and that you should therefore, in your deliberations, bear in mind that for at least twenty days before that time the Plaintiffs had ceased to be the attorneys for the Defendant, and the Defendant had knowledge of that fact, and no negligence or misconduct can be attrib-
65 uted to the Plaintiffs by reason of their having failed to resist the proceedings resulting in the discontinuance, and until such time there was no duty, upon the undisputed evidence, resting upon the Plaintiffs, to obtain or seek to obtain an Order of Court making the Estate liable for the costs and expenses of the assignee including the attorneys' fees, and therefore, I instruct you that there was at that time when that Order of discontinuance was entered, no duty resting upon the Plaintiffs as attorneys for the Defendant, and upon their alleged neglect in failing to obtain an Order to make the Estate liable for such expenses, or to prevent the Estate from passing out of the hands of the assignee, your verdict should be for the Plaintiffs.

"Refused and excepted to by the Plaintiffs this 9th day of Dec. 1899.

JOHN L. McMASTER, *Judge*"

8. In all your considerations upon the sole issue which remains for you to try, you should bear in mind the instructions of the Court to the effect that upon the issue tendered by the complaint the Plaintiffs are entitled to a verdict, and that the Defendant has in terms, so conceded. You should further bear in mind that upon all of the issues tendered by the Counter-claim that have for their foundation the charge that the Plaintiffs were guilty of neglect or of misconduct at the time of the sale, your finding should be for the

Plaintiffs, and that the only question left for you to determine, is whether the Plaintiffs were guilty of negligence in failing to obtain such an Order as would prevent the assets from passing out of the possession of the assignee until he should have been re-imbursed for his expenses, costs and charges including his attorneys' fees, and upon this issue, if you find that before the time had arrived when it was necessary for the Plaintiffs, as the attorneys for the Defendant, to take some active steps in court by obtaining an Order making
66 the attorneys' fees and expenses of the Estate a charge upon the assets thereof, the relation of the attorney and client had ceased, the Defendant cannot recover and upon this issue your verdict should be for the Plaintiffs.

"Refused and excepted to by Plaintiffs, this 9th day of December 1899.

JOHN L. McMASTER, *Judge.*"

9. The Constitution of the United States provides that full faith and credit shall be given by each state to the judicial proceedings of every other state. Art. 4. Section, 1.

In this case the Plaintiffs plead as against the Counter-claim of the Defendant, the bar of the Judgment obtained in the Circuit Court of Cook County, Illinois, and in determining the evidence in this case, you must give full faith and credit to the Record of such adjudication. If you find it the Law of Illinois that when Plaintiffs sue in *indebitatus assumpsit* upon a *quantum meruit* suit, the burden is upon them of showing that they have rendered services of the value alleged in the complaint, and that upon such allegation a judgment had been recovered by the Plaintiffs, you must take it as conclusive that the services sued for were rendered as the Law required them to be rendered and that they were of the value as found by the judgment in evidence, and therefore, the Defendant is by such record, concluded and estopped from saying either that the services were not so rendered or that the services sued for were not properly rendered or that they were not of the value as found and adjudged by the Court, and this you are required to do under the provisions of the Constitution of the United States.

"Refused and excepted to by Plaintiffs this 9th day of December 1899.

JOHN L. McMASTER, *Judge.*"

10. If you find from the evidence that at some time pre-
67 vious to the final discontinuance of the assignment proceedings, and while the assets of the Trust Estate remained in the jurisdiction of the Court even though actually in the possession of the Mortgagee, the Plaintiffs and the Defendant so conducted themselves that both of them understood that the relation of attorney and client between them had ceased, and both acted upon the understanding, even though there was no formal expression of discharge of the attorneys by the Defendant, then your verdict will be for the Plaintiffs for the amount of their judgment, interest and costs.

"Refused and excepted to by the Plaintiffs, this 9th day of December 1899.

JOHN L. McMASTER, *Judge.*"

"W. A. KETCHAM,
CHAS. MARTINDALE,,
Att'ys for Plaintiffs."

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Defendant's Instructions.

Comes now the Defendant, Harry B. Gates, by his counsel Baker & Daniels, Lewis C. Walker, and Edward F. Gates, and moves the Court to instruct the jury trying said cause, in writing, and to give severally and each of the following Instructions:

1. Gentlemen of the Jury;

I hereby instruct you to find for the Defendant upon his Counterclaim.

2. I instruct you that if you find from the evidence that the Defendant employed the Plaintiffs to look after his interests as
68 well as to act as the attorneys for him as assignee and to protect him by charging the Trust Estate with his attorneys' fees and the value of his own services and expenses, and if you further believe from the evidence that matters were not in fact litigated and determined in the Trial of the case of Jacob Newman, George Northrup and S. O. Levinson (the Plaintiffs herein) against Harry B. Gates (the Defendant herein) in the Trial of the said cause in the Circuit Court of Cook County, Illinois: and if you further believe from the evidence that the Plaintiffs were not discharged by the Defendant before the property and Estate of the American Mortar Company were taken out of the Lake County Court of Illinois by the majority in number of the creditors of said Company and the consent of the debtor: and if you further believe from the evidence that the said property and assets of the said Estate of the said American Mortar Company were thus taken out of said Court without the knowledge of the Defendant and the said Plaintiffs were employed as aforesaid, and the said Plaintiffs were not discharged as aforesaid and that the said matters were not tried and determined in the former case as aforesaid; and if you further believe that the Plaintiffs failed to procure the proper Order or Orders charging the Trust Estate with the payment of his said attorneys' fees and his own services as assignee before said assets and property of the said American Mortar Company was thus taken out of the Court as aforesaid; then I

instruct you that the said Plaintiffs were negligent in their duty to the Defendant and your verdict should be for the Defendant upon his Counter-claim.

3. If you believe from the evidence that the Plaintiffs, or the said Solomon Levinson, one of the Plaintiffs, was at the time of the sale of the assets of the said American Mortar Company under Order of the Lake County Circuit Court of Illinois, acting as the at-
69 torneys, or the attorney for the Defendant as assignee of the said property; and if you further believe from the evidence that the said Plaintiffs, or one of them so acting as the assignee's attorney at said sale, by his conduct in bidding at said sale, thereby prevented a *bona fide* sale of the property of the said American Mortar Company and thereby prevented assets of sufficient amount coming into the hands of the assignee out of which the said assignee could have reimbursed himself by proper order of the Lake County, Court and that said Order of re-imbursement could have obtained, and if you believe from the evidence that said matters were not set up or tried and determined upon the Trial of the cause of Jacob Newman, George Northrup Jr. and S. O. Levinson (the Plaintiffs herein) against Harry B. Gates (the Defendant herein) in the Circuit Court of Cook County, Illinois, then I instruct you that your verdict must be for the Defendant upon his Counter-claim.

4. In weighing the evidence and determining the facts in this cause, you must consider all the evidence submitted in said cause. You should further consider the interest in the ultimate result of said cause upon the part of respective witnesses produced, their conduct upon the stand and the knowledge displayed by them of the facts recited.

5. In weighing the expert testimony submitted in this cause, I further instruct you that if any of the elements of the Defendant's Counter-claim, or a material fact or facts involved in the Defendant's Counter-claim is omitted in the hypothetical question or questions asked the expert, you have a right and should consider and determine for your own minds, whether said omission or omissions if any there be, was a material omission or omissions and if so, you may consider the effect of such omission or omissions, if any such omission there be in determining the right of the expert's opinion.

70 6. In considering the evidence submitted in this cause, I instruct you that the number of witness produced and testifying upon any one fact, should not control your finding or such fact if it be controverted by other witness or witnesses, or other evidence submitted to you, but you should consider all the evidence submitted in said cause, the knowledge of the facts displayed by the witness or witnesses and the interest in the ultimate result of said cause, of the respective witnesses produced.

7. If you find for the Defendant upon his Counter-claim you shall assess and measure his damage as a sum equal to the addition of the amount of the judgment rendered by the Cook County Court of Illinois and sued upon in this cause by the Plaintiffs herein, with interest at five per cent. from the date of rendition of said judgment to the date of your verdict, and the amount which you may determine

from the evidence, is due the Defendant for his services as assignee in the said assignment proceedings of the American Mortar Company in the Lake County Court of Illinois. And if you find for the Defendant upon his Counter-claim, the form of your verdict shall be, "We the Jury, find for the Defendant upon his Counter-claim and assess his damages at $—.

If you find for the Plaintiffs and against the Defendant upon his Counter-claim, the form of your verdict shall be, "We the Jury find against the Defendant upon his Counter-claim and find for the Plaintiffs upon their complaint and assess their damages at $—.

8. I further instruct you that if you believe from the evidence that the Defendant did not discharge the Plaintiffs, but a disagreement ocur-ed between them as to whether the Plaintiffs' services were at an end at or about the time of the sale of the assets of the American Mortar Company, then I instruct you that the fact that there was a disagreement as aforesaid would not in itself relieve the
71 plaintiffs from the duty, if any duty there be, to procure the proper Order of the Lake County Court having jurisdiction of the assignments, charging the Estate with liability for the Defendant's attorneys' fees and services.

9. I further instruct you that if you believe, from the evi-, that the Defendant did discharge the Plaintiffs, or if you believe from the evidence, that simply a misunderstanding arose between the Plaintiffs and the Defendant at or about the time of the sale of the assets of the American Mortar Company as to whether the Plaintiffs were discharged or not, and if you further believe, from the evidence, that Whitney & Upton, a firm of Lawyers in Waukegan were employed by the Plaintiffs to act for them or in connection with them, as attorneys for the Defendant, then I charge you that the said Whitney & Upton, so employed by the Plaintiffs, were agents of the said Plaintiffs, and the neglect upon the part of Whitney & Upton, as such attorneys, to procure the proper order of the Lake County Court of Illinois, having charge of the said assignment, if any such neglect there be, or if any such order or orders were not procured, was the act and neglect of the Plaintiffs herein.

BAKER & DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Att'ys for Defendant."

STATE OF INDIANA, *Marion County, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE W. NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Instructions of the Court.

72 1. This is an action brought by Jacob Newman, George W. Northrup, Jr., and S. O. Levinson, partners, against

the Defendant Harry B. Gates, and the Plaintiffs allege as their cause of action in the complaint that on the 13th day of July 1893, they recovered a judgment against the Defendant for the sum of Thirteen Hundred Dollars ($1300.00) in the Circuit Court of Cook County, Illinois; that said judgment together with the costs thereon, is unpaid and is still in force, and that there is due and unpaid to Plaintiffs thereon the sum of said judgment with interest.

The Defendant admits the allegations of said complaint; and in your deliberations you will regard it as a settled fact that the amount of the judgment, to-wit: the sum of Thirteen Hundred Dollars ($1300.00) from July 13th 1893, at the rate of five per cent. per annum, the whole amounting to $1715.26 is due to the Plaintiffs on their complaint and the question for you to determine is, whether the whole or any part of the amount alleged to be due to the Defendant upon his Counter-claim is due him; and if so, how much.

2. The Defendant filed an Answer to said Complaint in two paragraphs, which are numbered one and two, but these paragraphs of answer are out of the case and it is not necessary for you to consider them, and you will not consider them.

3. The Defendant has filed a Counter-claim in which he alleged that prior to the first day of September, 1892, there was in existence a corporation duly organized under the Laws of Indiana, by the name of the American Mortar Company, which corporation has been engaged in business in the City of Chicago and owned a Plant, including Real Estate and boats located in the City of Waukegan, Illinois. That said Corporation had become financially embarrassed and the stockholders had decided to make a statutory assign-
73 ment for the benefit of creditors. And Alfred B. Gates, the President of the corporation and Harry B. Gates the Defendant herein, who was in no wise connected with the American Mortar Company, went to the offices of the Plaintiffs in Chicago, and employed Plaintiffs as attorneys to attend to the legal matters to perfect such assignment for the benefit of creditors by said Company, and directed that the assignment should be made to Harry B. Gates, the Defendant, as Trustee. That said assignment was made to Harry B. Gates as Trustee or assignee, and he qualified as such. That Defendant, said Harry B. Gates, requested Plaintiffs to look after, direct and control all legal matters of whatsoever kind and nature which would be necessary and proper for him as such Trustee to have looked after by competent lawyers. That Plaintiffs superintended the preparations of Inventories the procuring of orders for the sale of the property and rendered other legal services affecting said Trust to the Defendant, Harry B. Gates, as Trustee; and that Defendant relied wholly upon the advice and counsel of Plaintiffs as his attorneys in the management of said Trust, with this exception, that sometime after he had qualified as such Trustee, the Plaintiffs employed a firm of Lawyers at the City of Waukegan to act with them in matters, connected with such Trust coming up in the Circuit Court of Lake County, Illinois, held at the City of Waukegan, the Defendant further alleges that it is the Law of the State of Illinois that a Trust Estate could only be made liable for the pay-

ment of legal services rendered to the Trustee by a formal Order of Court, authorizing the employment of a Lawyer for the rendition of such services. He further alleges that he was a layman and did not know such to be the Law and that said Plaintiffs failed to inform and advise him that such was the Law, and further failed and neglected as his attorneys in said Trust to procure any such order at any time or attempt to do so and no such order ever was procured or attempted to be procured and no such order was ever made by any Court: and that they gave him to understand
74 that the Trust Estate would be liable for their fees for services rendered to him as such Trustee. That by reason of the fact that no such order was obtained the Defendant became personally and individually liable to the said Plaintiffs for their fees for services rendered to him as Trustee. That if said order had been procured he would not have been liable. That the neglect of said Plaintiffs to procure a proper order of the proper Court authorizing the said Trustee to employ attorneys for legal advice and services and their neglect to inform him that such order was necessary for his protection personally and individually was the cause of the rendition of the judgment sued on; and Defendant claims that by reason of the Plaintiffs' failure and neglect to obtain such order he had been damaged in the sum equal to the amount of the judgment which Plaintiffs obtained against him, and also to the extent of the value of the services which he rendered as such Trustee, and he claims damages in the sum of Twenty-five Hundred Dollars ($2500.00).

4. The Defendant also alleges in his Counterclaim against the Plaintiffs that the sale of the assets of the American Mortar Company by the Defendant, Gates, as assignee or Trustee, was made on the 18th day of April, 1893, and that the Defendant Harry B. Gates proceeded to cry the sale at public outcry; that bids were received from several persons; that the highest bid for the property was for Fifty-three Hundred Dollars ($5300.00) and that the bid made next before the last bid was made by one O'Brien, who was financially responsible and ready to make good his bid; that the parties making the highest bid communicated by telephone with Newman & Northrup in the City of Chicago, said sale being made at Waukegan, requesting Newman & Northrup for leave to draw upon them for the amount of cash payment necessary to make good their bid; and this authority to draw upon them was refused by Newman & Northrup and the parties withdrew their bid;
75 that Levinson who was in attendance on the sale and advising the Defendant, Harry B. Gates, advised Gates that he must at once re-offer the assets for sale, which he proceeded to do; that O'Brien who had made the next to the last bid on the first sale, was again a bidder and that Levinson, who was there as attorney for Gates also bid for the property; that O'Brien challenged the right of Levinson to bid because he was the attorney for the Trustee, and refused to bid against Levinson; that Levinson bid Three Thousand Dollars ($3000) for the assets and advised the Defendant Gates as Trustee, that the sale of the assets must be made

to Newman & Northrup for whom he was bidding, and the Defendant Gates, as Trustee, acting upon Levinson's advice, struck off the property to Newman & Northrup and received from them a check upon a Chicago Bank in payment for their bid; that the sale was reported to the Circuit Court having jurisdiction of the assignment, but before the same was approved by the Court the fact developed that the Mortgagee of all the property of the American Mortar Company, being the assets offered for sale, had in pursuance of Law taken possession of the property and was holding the property as against the Trustee and the purchasers at said sale; and upon this showing the Circuit Court set aside the sale and released Newman & Northrup from their bid; that afterwards the Mortgagee procured the consent in writing of the American Mortar Company and of a majority of its creditors in numbers and amount and in pursuance of a statute of the State of Illinois permitting the same to be done, had the assignment proceedings discontinued, which discontinuance took all the assets out of the possession of the assignee and left him no property or assets out of which he could pay the expenses of said assignment including the fees of Newman Northrup & Levinson and his own claims for compensation and cash advanced; that if it had not been for the fact that Newman & Northrup bid at the said sale
76 O'Brien would have bid in the property for Five Thousand Dollars ($5000) and would have completed the purchase and the Trustee would have had ample funds to pay the fees of Newman Northrup & Levinson, his own compensation and the expenses of the Trust; and that the bidding by Newman & Northrup at said sale was a breach of their duty and obligation to the Defendant, Harry B. Gates, as his attorneys, and that by reason thereof he had been damaged in the sum of Twenty-five Hundred Dollars ($2500).

5. The Plaintiffs have filed a reply to the Counter-claim of the Defendant in two paragraphs. The first paragraph is a general denial, denying all the material allegations contained in said paragraph of Counter-claim. In their second paragraph of reply to said counter-claim they set up as defense thereto that all of the matters embraced in said counter-claim are *res adjudicata*, that is, that said matters were adjudicated by the Circuit Court of Cook County in the suit in which the Plaintiffs obtained the judgment sued on in this action, and that by reason of such adjudication the Defendant is estopped from using the same matters by way of Counter-claim, in this action.

6. Under the issues formed by the Plaintiffs' general denial of Defendant's said Counter-claim, the burden is upon the Defendant, Harry B. Gates, to prove the material allegations of his Counter-claim as to one or more of the issues set forth therein by a preponderance of the evidence; and unless he has so proved the material allegations of one or more of said issues, your verdict must be for the Plaintiffs for the amount of Plaintiffs' judgment and costs, together with interest thereon as hereinbefore set forth.

7. As to all matters embraced in the Defendant's Answer or Counter-claim based upon or growing out of the alleged misconduct

or violation of duty by the Plaintiffs at the sale, I instruct you that upon the undisputed evidence in this cause, all such matters
77 were submitted to the Court in the trial of which the Plaintiffs obtained the Judgment sued on in this action, and that it is the unquestioned Law in Illinois, that having been so submitted, the Defendant cannot be heard thereafter to set up such matters, or any of them, by way of an original cause of action, or by way of a Counter-claim or set off in this action. All these matters having been adjudged by a Court of competent jurisdiction, both as to the subject matter of the action and the person of the Defendant, and therefore upon this issue your finding should be for the Plaintiffs, and in whatever form such averments of the Third Paragraph of the Defendant's Answer may come before you for your consideration upon any issue, you should take it as conclusively settled that the Defendant has in this action no right to complain and cannot be heard to say that there was any misconduct or breach or neglect of duty by the Plaintiffs in connection with the sale of said assets by the assignee, that will in anywise afford the basis of a complaint in favor of the Defendant and against the Plaintiffs.

8. In determining whether or not the Defendant can recover by reason of any alleged breach of duty on the part of the Plaintiffs in their failing to obtain an order from Court authorizing the employment of counsel and relieving him from personal liability, I now instruct you that it is the Law of the State of Illinois, as shown by the testimony in this case, that it is not necessary for an assignee or for his attorneys to obtain an Order of Court in the outset, authorizing the employment of such attorneys, but that upon all the evidence in this case, there is no conflict on this question, it being agreed by all of the witnesses that the obtaining of such order in the outset, or at any time prior to the final settlement of the assignee's accounts, is unnecessary; and I also instruct you in this connection, that it is the Law of Illinois, as settled by the evidence in this case,
78 that had an order been obtained authorizing the assignee to employ attorneys, the entry of such an order would not have relieved the assignee from personal liability to the Plaintiffs for their attorneys' fees. In considering therefore, the issue tendered upon the alleged neglect of duty the Plaintiffs in failing to obtain such an order, you should consider it as the settled Law of Illinois that the Plaintiffs were not compellible to obtain such an order in advance, and that there was no legal duty resting on them to obtain any order of that character at any time prior to the final settlement of the Defendant's accounts as assignee; and under the Law of Illinois and the evidence in this case, you are not at liberty to find that the Plaintiffs had been guilty of neglect of duty in failing to procure such order, unless at the time of the final action of the Court in said Trust, when said assignment proceedings were taken out of the Court by the action of the creditors of said Mortar Company, and said company the Plaintiffs were still the attorneys of the Defendant, and he was relying upon them as such and they failed or neglected to make provision for his allowance out of the assets of said Trust before the same, or at the time said Trust was discon-

tinued in said Court; nor would they be liable unless at that time there were assets in the estate out of which the Court might under the Law of Illinois, make an allowance to reimburse the assignee for his attorneys' fees and for the value of his services as assignee, either in whole or in part.

"Given and excepted to by the Plaintiffs this 9th day of Dec., 1899.

JOHN L. McMASTER, *Judge.*"

9. If you find from the evidence that the Defendant employed the Plaintiffs to look after his interests and to act as attorneys for him as assignee, and to protect him by charging the Trust
79 Estate with his attorneys' fees and the value of his services and you further find that the Plaintiffs were not discharged by the Defendant, or that the relation of attorneys and client had not ended before the property and Estate of the American Mortar Company were taken out of the Court of Lake County, Illinois and by the majority in number and amount by the creditors of said company and the consent of th[illegible]r; and you further believe that under the Law of Illinois, i[illegible] duty of the Plaintiffs before said Estate and assets were p[illegible] to go out of said Court in the manner stated, to procure an [illegible] charging said estate and assets with such attorneys' fees and for the services of the assignee; and you further find that said property and assets of said company were thus taken out of said Court without the knowledge of the Defendant and without such order; and you further find that under the Law of Illinois the matter of such an order was not adjudicated in the Circuit Court of Cook County, Illinois, in which Plaintiffs obtained the judgment sued on in this action; and if you further find that by the Plaintiffs' failure to procure such Order charging the assets of said Estate, if they did so fail, the Defendant was prevented from being re-imbursed for his Attorneys' fees and prevented from securing payment for the value of his services, then I instruct you that your verdict should be for the Defendant upon his Counter-claim for his said attorneys' fees to the amount of the judgment sued on and the interest thereon, and the value of his services as assignee, if you believe that the assets were sufficient to cover such fees and services, or if not sufficient to cover them then for such part, if any, of such fees and services as such assets were sufficient in value to cover.

10. As before stated the Plaintiffs in addition to their general denial, of said Counter-claim, have filed a plea of former ad-
80 judication, in which they claim that all the matters now urged in said Counter-claim were determined and adjudicated in the suit in the Cook County Circuit Court in which they obtained the judgment now sued upon. If therefore you find from a preponderence of the evidence that the Law of Illinois is that the failure of Plaintiffs to procure an Order, as before stated, if they did so fail, was a matter which became and was adjudicated under such Law, whether evidence was introduced on such point or not, then I instruct you that you must find for the Plaintiffs as to said Counter-

claim, as the Defendant would in such case be barred whether he did or did not introduce evidence on the matter of such Order, and he cannot be heard to litigate it in this action.

11. If you find from the evidence that at some time previous to the final discontinuance of the assignment proceedings in the Court of Lake County, and while the assets of the Trust Estate still remained in the jurisdiction of the Court, even though actually in the possession of the mortgagees, the Defendant, Harry B. Gates, discharged the Plaintiffs as his attorneys in said assignment, then you should find against the said Defendant on his Counter-claim; or if you should find that prior to such discontinuance of said assignment proceedings, the relations of the Plaintiffs and Defendant were such that it was mutually understood between the Plaintiffs and the Defendant that the relation of attorneys and client had ceased, and that Plaintiffs had no authority to represent the Defendant, and did not so represent him further, in the matter of such assignment, then you must find against the Defendant on his Counter-claim.

12. I have used in these Instructions at different times the phrase "preponderance of the evidence" and it is proper that I should state to you what is meant thereby. By a preponderance of the
81 evidence is not necessarily meant the greater number of witnesses, but the evidence which is greater in weight and credibility.

13. In this case expert testimony of lawyers of the State of Illinois has been introduced as to the Law of that State. This testimony has largely been elicited in answer to hypothetical questions, that is upon a supposed state of facts. In weighing such expert testimony you have a right to determine whether the material facts, as shown by the evidence in this case, were embraced in the hypothetical questions put to such witnesses, and whether material facts shown by the evidence in this case, were omitted, or whether there were material facts suppressed in said questions which have not been shown by the evidence in this case, and give such expert testimony such weight, as you believe it is entitled.

14. This is a civil action, and while you are the judges as to what facts are established by the evidence, and what the Law of Illinois is so far as the same has been submitted to you as a fact under the evidence, yet as to matters of Law in other respects, you will take the Law, and it is your duty to take it as it is given to you in these Instructions.

15. You are not to be governed by sympathy or prejudice, or by mere conjecture in arriving at your verdict; nor should the question of the residence or non-residence of the parties affect your consideration of the case; but you are to be governed solely by the Law and the evidence.

16. The Court has already instructed you that the amount due the Plaintiffs on the judgment sued on by them is the sum of $1715.26; but you are to determine under the evidence and the instructions of the Court, the amount of damages, if any, to which the Defendant is entitled on his Counter-claim, and you have also been instructed as to the measure of such damages in case you

find in his favor on such Counter-claim. In case you find
82 against him on his Counter-claim the form of your verdict will be "We the jury, find for the Plaintiffs on their Complaint and assess their damages at the sum of $1715.26, and we also find for Plaintiffs on the Defendant's Counter-claim." In case you find for the Defendant on his Counter-claim, you will ascertain in whose favor the excess, if any, is, and the form of your verdict will be; "We the jury, find for the Plaintiffs on their Complaint, and also find for the Defendant on his Counter-claim, and assess the excess of the damages of the —— at the sum of $—," filling in the excess.

17. You are the exclusive judges of the evidence and the credibility of the witnesses. It is your duty to reconcile the statements of witnesses so as to give credence to all of the testimony, if you can; but if you cannot do this, on account of contradictions, then upon you rests the responsibility, under your oath, of determining whom you will or will not believe. In weighing the evidence, you may consider the inherent reasonableness of the evidence of the various witnsses, how far the same is consistent or inconsistent with the ordinary conduct of men under the circumstances shown to surround the transaction; whether the evidence of any witness is supported or contradicted by the other evidence in the case, the interest or lack of interest the witness may have in the result of the action, his manner and bearing on the witness stand while testifying, his power of memory or lack thereof, his opportunity to know the things about which he testifies, and all the other facts and circumstances disclosed by the evidence; and from all the evidence, under the Instructions of the Court, determine the rights of the parties, and make your verdict accordingly.

JOHN L. McMASTER, *Judge.*"

"And the jury having agreed upon their verdict, now re-
83 turn the same into open Court as follows:

"We the jury, find for the Plaintiffs on their Complaint and also find for the Defendant on his Counter-claim and assess the excess of the damages of the Defendant at the sum of $184.74 dollars.

ALBERT L. KERR, *Foreman.*"

And afterwards, to-wit: on the 11th day of December, 1899, being the 7th Judicial day of the December Term 1899 of said Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come the Plaintiffs and file their motion for judgment in their favor and against the Defendant for the sum of $1715.26, notwithstanding the verdict in this cause, which motion reads as follows, that is to say:"

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Plaintiffs' Motion for Judgment.

The Plaintiffs move the Court to render judgment in their favor and against the Defendant for the sum of Seventeen Hundred Fifteen Dollars and twenty-six cents ($1715.26), notwithstanding the verdict in this cause.

W. A. KETCHAM,
CHARLES MARTINDALE,
Att'ys for Plaintiffs."

"And the Court being advised in the premises, overrules Plaintiffs' said motion to which ruling Plaintiffs except and are allowed
84 ten days to file a Bill of Exceptions."

And afterwards, to-wit: on the 12th day of December, 1899, being the 8th Judicial day of the said December Term 1899 of said Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come the Plaintiffs and tender their Bill of Exceptions No. 1. which Bill of Exceptions is signed by the Court, filed and ordered made a part of the Record herein and reads as follows:"

STATE OF INDIANA, *County of Marion, ss:*

Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE W. NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Plaintiffs' Bill of Exceptions No. 1.

Be it Remembered, That heretofore, to-wit: on the 11th day of December A. D. 1899, the same being the 7th Judicial day of the December Term of said Court the plaintiffs in this cause, filed their motion that the Court render judgment in favor of the Plaintiffs and against the Defendant for the sum of Seventeen Hundred Fifteen Dollars and twenty-six cents ($1715.26) notwithstanding the gen-

eral verdict in said cause, which motion is in the words and figures following, to-wit:"

(Heretofore inserted, see line — page — of this transcript.)

"And on said day the Court, being sufficiently advised in the premises, overruled the said motion, to which ruling of the Court the Plaintiffs, at the time, excepted, and ten days' time was given the Plaintiffs within which to file a Bill of Exceptions.

85 And now, within the time, allowed by the Court to file a Bill of Exceptions, the Plaintiffs tender to the Court this their Bill of Exceptions, and ask that the same may be signed and made a part of the Record in said cause. All of which is done and ordered on this the 12th day of December A. D. 1899.

JOHN L. McMASTER,
Judge of the Superior Court
of Marion County, Indiana."

And afterwards, to-wit: on the 19th day of December, 1899, being the 16th Judicial day of the December Term aforesaid, before the same Hon. Judge, the following proceedings were had herein:

"It is now ordered by the Court that the Instructions to the jury requested by the Plaintiffs being the instructions filed December 7th 1899 requesting the Court to find a verdict for Plaintiffs for the amount of their judgment with interest and costs, and also their instructions numbered from one (1) to ten (10) inclusive: also the instructions requested by the Defendant numbered from one (1) to nine (9) inclusive, and also the instructions given by the Court numbered from (1) to seventeen (17) inclusive, shall all and severally be made part of the Record in this cause without a Bill of Exceptions."

And afterwards to-wit: on the 21st day of December, 1899, being the 16th Judicial day of the December Term 1899 of said Court before the same Hon. Judge the following proceeding was had herein, viz:

"Come the Plaintiffs and file their motion for a New Trial herein as follows, viz:"

STATE OF INDIANA, *County of Marion, ss:*

86 Superior Court.

No. 46388.

JACOB NEWMAN, GEORGE W. NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Motion for New Trial.

The Plaintiffs move the Court, to grant them a New Trial in this action for the following causes:

1. That the verdict of the jury is not sustained by sufficient evidence.

2. That the verdict of the jury is contrary to Law.

3. Error of Law occurring at the Trial and excepted to by the Plaintiffs, as follows:

"*a.* The Court erred in admitting to be read in evidence the transcript of the evidence introduced in the Trial of the action by the Plaintiffs as against the Defendant in the Circuit Court of Cook County, Illinois, as certified by Zeno T. Griffin, official reporter.

b. That the Court erred in admitting to be read in evidence the certified copy of proceedings in the Lake County Court of Lake County, Illinois, in the matter of the assignment of the American Motor Company.

c. That the Court erred in permitting the witness Warren Hussey to testify in answer to the questions:

Q. "State to the jury whether or not Mr. O'Brien bid at that sale?"

A. He did.

Q. "You may state what amount?"

(Objection overruled.)

Q. "Now Mr. Hussey, you may answer the question."

A. Do you want the bid on the first sale?

Q. "Yes, sir.

A. "He bid in the neighborhood of Six Thousand Dollars.

87 Q. "You may state whether or not Mr. O'Brien bid at the second offering for a while that you bid on?"

A. "He did."

d. That the Court erred in permitting the witness, James M. Condit, to testify in answer to the question,

Q. "Do you remember about how much he (Mr. Hussey) bid up to?"

A. "Yes sir."

Q. "Do you remember what he bid?"

A. "The last bid he made, his firm bid, between Fifty-five — fifty-six hundred dollars."

e. That the Court erred in permitting the witness, John B. Cockrum, to testify as an expert, over the objection of Plaintiffs as to his competency.

f. That the Court erred in permitting the witness, Harry B. Gates, to testify in answer to the questions:

Q. "At the second sale that you have referred to, at what amount was the property knocked off?"

A. "Twenty-nine Hundred Dollars."

g. That the Court erred in refusing to instruct the jury to find a verdict in favor of Plaintiffs and in refusing to give to the jury the instructions to that effect requested by the plaintiffs.

h. That the Court erred in refusing to give to the jury instruction numbered 6, requested by the Plaintiffs.

i. That the Court erred in refusing to give to the jury instruction numbered 7, requested by the Plaintiffs.

j. That the Court erred in refusing to — the jury instruction numbered 8, requested by Plaintiffs.

k. That the Court erred in refusing to give to the jury instruction numbered 9, requested by Plaintiffs.

l. That the Court erred in refusing to give to the jury instruction numbered 10, requested by the Plaintiffs.

88 *m*. That the Court erred in giving to the jury, on its own motion, instruction numbered 8.

n. That the Court erred in giving to the jury, on its own motion instruction numbered 9.

WILLIAM A. KETCHAM.
CHARLES MARTINDALE."

And afterwards, to-wit: on the 25th day of July, 1901, being the 22d Judicial day of the July Term aforesaid, before the same Hon. Judge, the following proceedings were had herein:

"Come the parties and the Court being sufficiently advised in the premises now overrules the Plaintiffs' motion for a New Trial herein to which ruling of the Court the Plaintiffs except and are allowed nienty (90) days to file a Bill of Exceptions, and ninety (90) days are allowed in which to file the Stenographers longhand transcript of the evidence and proceedings had and taken in short hand at the trial of this cause.

And the jury having returned their verdict herein the Court now renders judgment thereon:

It is therefore considered and adjudged by the Court that the Defendant have and recover of the Plaintiffs the sum of One Hundred and Eighty four dollars and seventy-four cents ($184.74) his damages as assessed by the jury on his Cross-Complaint, with six per cent. interest from December 9th 1899, and also his costs and charges herein laid out and expended, taxed at .... Dollars."

And the Plaintiffs now pray an appeal to the Appellate Court of the State of Indiana in this cause, which prayer is granted conditioned upon the filing of an Appeal Bond within sixty (60) days, with surety thereon, in the penal sum of Five Hundred Dollars ($500) said surety being — to the approval of this court."

89 And afterwards, to-wit: on the 23d day of September, 1901 being the 19th Judicial day of the September Term 1901 of said Court, before the same Hon. Judge, the following proceedings were had herein, viz:

"Come the parties by Counsel and the Transcript of Evidence in this cause, prepared by William S. Garber, official Stenographer, of this Court, is now filed in the office of this Court and ordered to be made a part of the Record herein."

And afterwards, to-wit: on the 25th day of September, 1901, being the 21st Judicial day of the September Term aforesaid of this Court before the same Hon. Judge, the following proceedings were had herein, viz:

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Entry.

Come now Jacob Newman and S. O. Levinson, surviving partners of the late firm composed of Jacob Newman, George W. Northrup, Jr. and S. O. Levinson, and suggest and show to the Court that since the trial of this case and since the overruling of the motion for a new trial filed by the Plaintiffs herein, the said George W. Northrup has departed this life, and thereupon said Jacob Newman and S. O. Levinson surviving partners as aforesaid now tender this their Bill of Exceptions No. 2 and ask that it be signed sealed and made a part of the record herein. And the Court having examined said Bill of Exceptions, does now allow the same and does now sign and seal the same, and thereupon said Bill of Exceptions is now on this day in open Court filed, the same being in the words and figures following, to-wit: (Here Insert)

90 STATE OF INDIANA, *County of Marion, ss:*

In the Marion Superior Court, December Term, 1899.

Honorable John L. McMaster, Judge.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Appearances.

For Plaintiffs: W. A. Ketcham, Esq., Charles Martindale, Esq., S. O. Levison, Esq., of Chicago.
For Defendant: Messrs. Hume and Gates, Messrs. Baker and Daniels, L. C. Walker, Esq.

91 STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court of Marion County.

No. 46388.

JACOB NEWMAN, GEORGE W. NORTHRUP, JR., and S. O. LEVISON,
vs.
HARRY B. GATES.

Plaintiffs' Bill of Exceptions Number Two.

Be it remembered that on the fourth, fifth, sixth, seventh and eighth days of December, A. D. 1899, the same being the first,

second, third, fourth and fifth judicial days of the December Term, 1899, of the Superior Court of Marion county and State of Indiana, the following proceedings were had in the above entitled cause in said Court, the Honorable John L. McMaster, Judge of said Court, presiding, to-wit:

The cause being at issue the same came on for trial before the Court and jury, W. A. Ketcham, Esq., Charles Martindale, Esq., and S. O. Levison, Esq., of Chicago, appearing as counsel for the plaintiffs and Messrs. Gates & Hume, Messrs. Baker & Daniels and L. C. Walker, Esq., appearing as counsel for the defendant.

And be it further remembered that before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present William S. Garber, Official Reporter of said Court and as such duly appointed, sworn and qualified, to take down in shorthand the oral evidence, including both
92 questions and answers, and to note all rulings of the Court in respect to admission and rejection of evidence and the objections and exceptions taken thereto, and the documentary evidence on the trial of said cause, the said William S. Garber, having been at the time of his appointment duly sworn to faithfully perform his duties as such Official Reporter.

And be it further remembered that said Official Reporter was present and took down in shorthand the oral and documentary evidence given upon the trial of said cause, including both questions and answers, and noted all of the objections made to the admission of evidence and all of the rulings of the Court with respect to the admission and rejection of evidence and the exceptions taken thereto.

And be it further remembered that on the twenty-first day of December, 1899, the same being the eighteenth judicial day of the December Term, 1899, of the Superior Court of Marion County, State of Indiana, the following proceedings were had in the above entitled cause in said Cause, the Honorable John L. McMaster, Judge of said Court, presiding, to-wit:

The plaintiffs filed their motion for a new trial in this cause, which motion is in the words and figures following to-wit (here insert).

And be it further remembered that on July 25, 1901, the same being the — judicial day of the June Term, 1901, of the Superior Court of Marion County, State of Indiana, the following proceedings were had in the above entitled cause, before the Honorable John L. McMaster, Judge of said Court, to-wit:

The Court overruled the motion of the plaintiffs for a new trial in this cause, to which ruling of the Court the plaintiffs at
93 the time excepted, and ninety days' time was given to file a bill of exceptions herein, and ninety days' time was given to file a long hand transcript of the evidence, objections, rulings of the Court thereon and the exceptions taken thereto, including all documentary evidence, by the Official Reporter.

And be it further remembered that the plaintiffs Jacob Newman, George W. Northrup, Jr., and S. O. Levinson, having requested said Official Reporter to furnish them with a complete long hand tran-

script of said evidence, objections, rulings of the Court thereon and the exceptions taken thereto, including all the documentary evidence, and all the evidence given in said cause, a type written transcript of the same was made by said Official Reporter, William S. Garber, and by him filed with the Clerk of the Superior Court of Marion county, Indiana, on the twenty-third day of September, 1901.

And be it further remembered that on said twenty-third day of September, 1901, Honorable John L. McMaster, Judge of the said Superior Court of Marion County, before the same was filed attached to said long hand manuscript so prepared and filed by said Official Reporter his certificate that the foregoing transcript made by William S. Garber, Official Reporter, is correct and contains all the evidence in said cause.

And be it further remembered that on said twenty-third day of September, 1901, George B. Elliott, Clerk of the Superior Court of Marion county, and State of Indiana, attached to the long hand transcript of the evidence so prepared and filed by said Official Reporter his certificate that said transcript of the evidence was filed in his office by said Official Reporter on the twenty-third day of September, 1901.

94 That said original long hand, type written transcript of the evidence, objections, rulings of the Court thereon and the exceptions taken thereto, including all the documentary evidence and all the evidence given in said cause, so as aforesaid prepared and filed in the office of the clerk of the Superior Court of Marion county, on the twenty-third day of September, 1901, together with the certificate of John L. McMaster, Judge of the Superior Court of Marion county, and together with the certificate of George B. Elliott Clerk of the said Court, as aforesaid, are now hereby incorporated and embodied in this *bill of exceptions* and made a part hereof, and are in the words and figures following, to-wit: that is to say:

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97 STATE OF INDIANA, *County of Marion, ss:*

In the Marion Superior Court, December Term, 1899.

Honorable John L. McMaster, Judge.

No. 46388.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

Be it remembered That on the 4th, 5th, 6th, 7th and 8th days of December, A. D. 1899, the same being the 1st, 2nd, 3rd, 4th and 5th judicial days of the December Term, 1899, of the Superior Court of Marion County, State of Indiana, the following proceedings were had in the above entitled cause, before the Honorable John L. McMaster, Judge of said Court, to-wit:

The cause being at issue, the same came on for trial before the Court and a jury, W. A. Ketcham, Esq., Charles Martindale, Esq., and S. O. Levinson, Esq., of Chicago, appearing as counsel for the Plaintiffs, and Messrs. Hume and Gates, Messrs. Baker and Daniels and L. C. Walker, Esq., appearing as counsel for the Defendant.

And be it further remembered That before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present William S. Garber, Official Reporter of said Court, to take down in short hand the oral evi-
98 dence including both questions and answers, and note all rulings of the Judge in respect to the admission and rejection of evidence, and the objections and exceptions thereto, and the documentary evidence on the trial of said cause, the said William S. Garber having been, at the time of his appointment, duly sworn to faithfully perform his duties as such official reporter.

And be it further remembered That said Official Reporter was present and took down in shorthand the oral and documentary evidence given upon the trial of said cause, including both questions and answers, and noted all of the objections made to the admission of evidence, and all of the rulings of the court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

And the Plaintiffs, Jacob Newman, George Northrup and S. O. Levinson, having requested said Official Reporter to furnish them with a complete Transcript of said evidence, objections, rulings of the Court thereon, and the exceptions taken thereto, including all documentary evidence, a typewritten Transcript of the same was made by said Official Reporter, and by him filed with the Clerk of the Superior Court, of Marion County, Indiana, on the 23rd day of September, 1901; which Typewritten Transcript is in the words and figures following, that is to say:

The Defendant, having the opening and close, to maintain the

issues on his behalf, offered and introduced the following evidence, to-wit:

99 Mr. KETCHAM: May the Court please, it is admitted that under the Statute of Illinois judgments and decrees bear interest from the date of their rendition at the rate of five per cent. per annum.

The COURT: And that the judgment that is pleaded in the complaint is also admitted; and that the defendant asks the opening and close, and it is granted by the Court.

Mr. E. E. GATES: If the Court please, on behalf of the defendant, I will read in evidence this record of the Cook County Court, in the case of Jacob Newman *et al.*, Plaintiffs, *vs.* Harry B. Gates, *et al.*, Defendants, Gen. No. 114,714, Term No. 16,310.

The said record of the Cook County Court was admitted and read in evidence, the same being in the words and figures following, to-wit:

"UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Cook County, ss:*

Pleas before the Honorable Frank Baker, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 19th day) of June, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Present, Honorable Frank Baker one of the Judges of the
100 Circuit Court of Cook County, State of Illinois; Jacob J. Kern, State's Attorney; James H. Gilbert, Sheriff.

Attest:

FRANK J. GAULTER, *Clerk.*

Be it remembered that heretofore to-wit, on the 26th day of April A. D. 1893, there was filed in said Court a certain Præcipe for summons and thereupon there issued out of said Court and under the seal thereof the People's Writ of summons directed to the sheriff of Cook County to execute which said præcipe and said Writ together with the return of the sheriff thereon endorsed are in words and figures following, to-wit:

STATE OF ILLINOIS, *County of Cook, ss:*

Circuit Court of Cook County, April Term, A. D. 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Newman & Northrup, Plaintiff-,

vs.

HARRY B. GATES and A. B. GATES, Defendant-.

Ass't. Damages, $2,000.00.

The Clerk of said Court will issue a summons in the above entitled cause to said defendant- in a plea of trespass on the case on
101 promises, to the damage of said plaintiff- in the sum of Two Thousand Dollars direct the same to the sheriff of Cook County to execute and make it returnable to the May Term of said Court A. D. 1893.

NEWMAN & NORTHRUP,
Plaintiffs' Attorneys.

To Frank J. Gaulter, Esq., Clerk.
Chicago, Apr. 26th, 1893.

STATE OF ILLINOIS, *Cook County, ss:*

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summon Harry B. Gates and A. B. Gates, if they shall be found in your county, personally to be and to appear before the Circuit Court of Cook county, on the first day of the Term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the third Monday of May 1893, to answer unto, Jacob Newman, G. W. Northrup, Jr., and S. O. Levinson, as Newman & Northrup, in a plea of trespass on the case upon promises to the damage of said plaintiffs as it is said, in the sum of Two Thousand Dollars.

And have you then and there this Writ with an indorsement thereon in which manner you shall have executed the same.

Witness Frank J. Gaulter Clerk of our said Court and the seal thereof, at Chicago aforesaid this 26th day of April A. D. 1893.

[SEAL.] FRANK J. GAULTER, *Clerk.*

Indorsed.

102 Served this writ on the within named defendant, Harry B. Gates, by reading the same to him this 26th day of April 1893 other named defendant not found in my county.

JAMES H. GILBERT, *Sheriff,*
By D. W. NICKERSON, *Deputy.*

Pd. 75.

And afterwards to-wit, on the 5th day of May A. D. 1893, there was filed in said Court a certain Declaration in words and figures following, to-wit:

In the Circuit Court of Cook County, to May Term, A. D. 1893.

STATE OF ILLINOIS, *Cook County, ss:*

Jacob Newman, George W. Northrup and S. O. Levinson, as co-partners, as Newman & Northrup, Plaintiffs, in this suit, by themselves complain of Harry B. Gates and A. B. Gates, Defendants, in this suit, summoned, etc., of a plea of trespass, on the case on promises;

For that whereas, The said Defendants, heretofore, to-wit: On the first day of November in the year of our Lord One Thousand Eight Hundred and Ninety Two at Chicago, to-wit, at the County aforesaid became and were indebted to the said plaintiffs in the sum of two thousand dollars of lawful money of the United States of America, for divers goods, wares and merchandise, by the said plaintiffs, before that time sold and delivered to the said defendants, and at the special instance and request of the said defendants, and being so indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to-wit on the same day and year, and
103 at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned, when the said defendants shall be thereunto afterwards requested.

And whereas, also, The said defendants, afterwards, to-wit: on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants sold and delivered to the said defendants divers other goods, wares and merchandise of the said plaintiffs, the said defendants then and there undertook, and faithfully promised the said plaintiffs that the said defendants would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant, should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares and merchandise last mentioned, at the time of the sale and the delivery thereof were reasonably worth the further sum of Two Thousand Dollars, of like lawful money as aforesaid, to-wit: at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, The said defendants, afterwards, to-wit, on the same day and year, and at the place aforesaid, became and were indebted to the said plaintiffs in the further sum of Two Thousand Dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendants and at the like request of the said defendants. And in the like sum for other money by the said plaintiffs before that time paid, laid out

and expended for the said defendants and at the like request
104 of the said defendants. And in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiffs. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiffs. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiffs for the said defendants and at the like special request of the said defendants. And being so indebted, the said defendants in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid then and there undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested.

And whereas, also, The said defendants, afterwards, to wit: on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendants to the said plaintiffs and then and there being in arrears and unpaid, and upon such accounting the said defendants then and there were found to be in arrears and indebted to the said plaintiffs in the further sum of Two Thousand Dollars of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiffs, the said defendants in consideration thereof afterwards, towit: on the day and year last aforesaid, and at the place last aforesaid, then and there undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the
105 sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

Nevertheless, The said defendants (although often requested, etc.—have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiffs, the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of Two Thousand Dollars, and therefore the said plaintiffs bring suit.

NEWMAN & NORTHRUP,
Plaintiffs' Attorneys.

106 *Copy of Account Sued On.*

Harry B. Gates and A. B. Gates to Newman & Northrup, Dr.

To goods, wares and merchandise, sold and delivered....	$2000.00
To money lent and advanced.....	2000.00
To money paid, laid out and expended.....	2000.00
To money had and received, to and for the use of said plaintiff-	2000.00
To money due for interest and forbearance.....	2000.00
To labor services and material.....	2000.00
To balance due on account stated.....	2000.00

Plaintiffs' Affidavit of Amount Due.

Circuit Court of Cook County, April Term, A. D. 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON, as Copartners as Newman & Northrup, Plaintiffs,
vs.
HARRY B. GATES and A. B. GATES, Defendants.

STATE OF ILLINOIS, *County of Cook, ss:*

W. M. Northrup being duly sworn says he is the duly authorized agent in this behalf of said plaintiffs and that the demand of the plaintiff in the above entitled cause is for money due for legal services rendered and disbursements expended by said plaintiffs, for
107 said defendants, at the special instance and request of said defendants and that there is due to the plaintiffs from the defendants, after allowing to defendants all just credits, deductions and setoffs, the sum of Fifteen Hundred and Twenty Dollars.

W. M. NORTHRUP.

Subscribed and sworn to before me, this 5th day of May, 1893.
[SEAL.] BENJAMIN W. BECKER,
Notary Public.

108 Circuit Court, Cook County. Newman, *et al.*, *vs.* Gates, *et al.* Common counts with affidavit. Filed this Fifth day of May, 1893. Frank J. Gaulter, Clerk. Newman & Northrup Pl'tiffs' Att'ys.
[On the margin:] Fold.

And afterwards, to wit, on the 17th day of May, A. D. 1893, there was filed in said Court a certain appearance in words and figures following to wit,

STATE OF ILLINOIS, *Cook County, ss:*

In the Circuit Court of Cook County, May Term, 1893.

109 JACOB NEWMAN, G. W. NORTHRUP, JR., and P. O. LEVINSON, as Newman & Northrup, Plaintiffs,
vs.
HENRY B. GATES and A. B. GATES, Defendants.

Appearance.

Comes now Charles P. Griffin, and enters his appearance as attorney for Henry B. Gates, one of the above defendants, and the appearance of said defendant Henry B. Gates.

CHARLES F. GRIFFIN,
Attorney for One of the Defendants.

And afterwards to-wit on said 17th day of May, A. D. 1893, there was filed in said Court a certain plea which is in the words and figures following, to-wit:

STATE OF ILLINOIS, *Cook County, ss:*

In the Circuit Court of Cook County, May Term, 1893.

JACOB NEWMAN, G. W. NORTHRUP, JR., and P. O. LEVINSON, as Newman and Northrup, Plaintiffs,
vs.
HENRY B. GATES and A. B. GATES, Defendants.

Plea of Non-Assumpsit.

110 And the Defendant, Henry B. Gates, by Charles F. Griffin, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not promise in manner and form as the plaintiffs have above thereof complained against him; and of this he puts himself upon the Country, etc.

CHARLES F. GRIFFIN,
Attorney for Henry B. Gates.

STATE OF ILLINOIS, *Cook County, ss:*

In the Circuit Court of Cook County, May Term, 1893.

NEWMAN and NORTHRUP
vs.
HENRY B. GATES ET AL.

R. D. A. Wade makes oath and says that he verily believes that Henry B. Gates, one of the defendants in the above entitled cause, has a good defense to this suit, upon the merits, to the whole of the Plaintiffs' demands.

R. D. A. WADE.

Subscribed in my presence and sworn to before me, this 17th day of May, 1893.

MINNIE ZOLLINGER,
[SEAL.] *Notary Public.*

111 General No. 114,714. Term No. 16310. In the Circuit Court. Newman and Northrup *vs.* Henry B. Gates, *et al.* Plea. Filed May 17, 1893. Frank J. Gaulter, Clerk. Charles F. Griffin, Attorney for H. B. Gates. Suites 1113, 1114, Tacoma Bldg., Chicago.

[On the margin:] Fold.

And afterwards to wit, on the 25th day of May, A. D. 1893, there was filed in said Court a certain notice and affidavit, in words and figures following to wit.

STATE OF ILLINOIS, *County of Cook, ss:*

In the Circuit Court of Cook County.

G. No., 114714; T. No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendants.

112 To Charles F. Griffin, Attorney for said defendant Harry B. Gates:

Please take notice that on the 25th day of May, A. D. 1893, an affidavit, a copy of which is herewith served upon you, was duly filed in said suit, and that the Clerk of said Court will place said suit on the short cause calendar for trial, as by statute made and provided.

NEWMAN AND NORTHRUP,
Attorney- for Plaintiffs.

Dated Chicago May 25, 1893.

Received copy of the foregoing notice this 25th day of May, A. D. 1893.

CHARLES F. GRIFFIN,
Attorney for Defendant H. B. Gates.

STATE OF ILLINOIS, *County of Cook, ss:*

In the Circuit Court of Cook County.

Gen. No., 114714; Term No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendant-.

S. O. Levinson being first duly sworn deposes and says that he is one of the Plaintiffs in the above entitled cause at law, now pending in said court, and that he makes this affidavit for and on behalf of himself and his said co-plaintiffs, and that he verily be-
113 lieves that the trial of said suit will not occupy more than one hour's time, and therefore prays that the same be placed on the short cause calendar, as by statute in such cause made and provided.

S. O. LEVINSON.

Subscribed and sworn to before me this 25th day of May, A. D. 1893.

BENJAMIN W. BECKER,
[SEAL.] *Notary Public in and for Cook County, Illinois.*

STATE OF ILLINOIS, *County of Cook*, ss:

In the Circuit Court of Cook County.

Gen. No., 114714; Term No., 16310.

JACOB NEWMAN, G. W. NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY B. GATES ET AL., Defendants.

S. O. Levinson being first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled cause at law now pending in said Court, and that he makes this affidavit for and on behalf of himself and his said co-plaintiffs and that he verily believes that the trial of said suit will not occupy more than one hour's time, and therefore prays that the same be placed on the short cause calendar as by statute in such case made and provided.

S. O. LEVINSON.

114 Subscribed and sworn to before me this 25th day of May A. D. 1893.

BENJAMIN W. BECKER.

[SEAL.] *Notary Public in and for Cook County, Illinois.*

And afterwards, to wit on the 20th day of June A. D. 1893 the following proceedings were had and entered of record in said Court to-wit.

114,714.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES ET AL.

Assumpsit.

Order June 20, '93.

On the agreement of said parties now here made in open Court this cause is submitted to the Court for trial without a jury.

And afterwards to wit, on the 12th day of July A. D. 1893 there was filed in said Court a certain appearance in words and figures following to wit.

STATE OF ILLINOIS, *Cook County, ss:*

Circuit Court of Said County.

NEWMAN ET AL.
vs.
GATES ET AL.

We hereby enter our appearance as attorneys for the plaintiffs in the above entitled cause.

WALKER, JUDD AND HAWLEY.

115 And afterwards to wit, on the 13th day of July A. D. 1893, the following proceedings were had and entered of record in said Court, to-wit.

114,714.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES and A. B. GATES.

Assumpsit.

Order July 13, '93.

This cause being called for trial come the parties by their attorneys respectively, thereupon on motion of plaintiffs' attorney it is ordered that all papers and proceedings herein, be and they are hereby amended by discontinuing as to defendant A. B. Gates, thereupon on the agreement of said parties made in open Court this cause is submitted to Court for trial without a jury and the Court now here after hearing all the evidence adduced and being fully advised in the premises finds the issues for the plaintiffs and assess their damages against Harry B. Gates to the sum of Thirteen Hundred Dollars, thereupon the defendant Harry B. Gates enters herein his motion for a new trial in said cause after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied.

Therefore it is considered by the Court that the plaintiffs do have and recover of and from the defendant, Harry B. Gates
$1300.00 their said damages of thirteen hundred dollars in form as aforesaid by the Court assessed together with their costs and charges in this behalf expended and have execution therefor.

116 Thereupon the defendant Harry B. Gates having entered his exceptions herein prays an appeal from the judgment of this Court to the Appellate Court in and for the first district of Illinois which is allowed upon filing herein his appeal bond in the penal sum of Two thousand dollars to be approved by the Court and upon filing herein his bill of exceptions by September 20, 1893.

STATE OF ILLINOIS, *Cook County, ss:*

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you, that of the Lands and Tenements, Goods and Chattels of Harry B. Gates Defendant, in your county, you cause to be made the sum of Thirteen hundred Dollars, and — cents, which Jacob Newman, G. W. Northrup Jr. and S. O. Levinson as Newman & Northrup, Plaintiffs, lately in the Circuit Court of Cook County, at a term thereof begun and held at Chicago, in said Cook County, on the third Monday of June A. D. 1893, recovered against the said defendant, and which, by the said Court, was adjudged to the said plaintiff- for their damages. And also the further sum of six dollars and — cents, which was adjudged to the said plaintiffs for their costs and charges in that behalf expended, wherefore the said defendant is convicted, as appears to us of record.

117 And have you these moneys ready to render to the said Plaintiff- for their damages and costs aforesaid, and make due return of this Writ, with an endorsement hereon in what manner you shall have executed the same, in ninety days from the date hereof.

Witness, Frank J. Gaulter, Clerk of our said Court, and the seal thereof, at the City of Chicago, in said county, the 17th day of July A. D. 1893.

[SEAL.] FRANK J. GAULTER, *Clerk.*

(Endorsed on back.)

Pd 10 The within named defendant and no property of the within named defendant found in my county on which to levy this writ, I therefore return the same, no property found and no part satisfied this 15th day of October, 1893.

JAMES H. GILBERT, *Sheriff,*
By SAMUEL E. EINEKSE.

118 8680. Oct. 15/93. Erickson. Circuit Court of Cook County. Execution No. 43600 Case No. 114714. Fee Book 60 page 133. Date July 17th, 1893. Jacob Newman *et al., vs.* H. B. Gates, *et al.*

Damages	$1300.00
Plaintiffs' Costs	6.00
Defendants' Costs	
	$1306.00

[On the Margin:] Fold.

The Sheriff will collect interest from July 13th 1893 and pay Plaintiffs' Costs to Plaintiffs' Attorneys. Frank J. Gaulter, Clerk. Newman and Northrup, Att'ys. Filed 3:15 o'clock P. M. July 17, 1893. James H. Gilbert, Sheriff.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Cook County, ss:*

I, Frank J. Gaulter, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify that I am the keeper of the records and files of said Court, and that the above and foregoing is a true, perfect and complete Transcript of the record together with the execution and return therein in a certain cause
119 pending in said court, on the Common Law side thereof, between Jacob Newman, *et al.* Plaintiffs and Harry B. Gates, *et al.* Defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago, in said County, *in said County,* this 20th day of April A. D. 1894.

[SEAL.] FRANK J. GAULTER, *Clerk.*

STATE OF ILLINOIS, *County of Cook, ss:*

I, F. M. Tuley Chief Justice of the Circuit Court of Cook County, in the State of Illinois, hereby certify that Frank J. Gaulter, who signed the above certificate, was at the time of signing the same, and is now, Clerk of the Circuit Court of Cook County, duly commissioned and qualified; that said Court is a Court of Record having a Clerk and Seal; that said attestation is in due form and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said Clerk is genuine.

Witness my hand and seal at Chicago, in said County of Cook, this 20th day of April A. D. 1894.

M. F. TULEY, [SEAL.]

Chief Justice of the Circuit Court of Cook County.

120 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *County of Cook, ss:*

I, Frank J. Gaulter, Clerk of the Circuit Court of Cook County, in the State of Illinois (said Court being a court of record), do hereby certify that the Honorable M. F. Tuley whose name is subscribed to the annexed and foregoing Certificate was, at the time of the signing thereof, and now is Chief Justice of said Circuit Court, duly elected, commissioned and qualified, and that his said signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said Circuit Court, at my office, in the city of Chicago, in said Cook County, this 20th day of April, 1894.

[SEAL.] FRANK J. GAULTER, *Clerk.*

Mr. E. E. GATES: Now, if the Court please, the defendant will read in evidence, under the Stipulation between the attorneys, the Transcript of the evidence introduced in the Cook county Circuit Court in the trial of the case on the Pleas that have just been read to

the jury. It is the trial at Chicago. I will read the stipulation first.

The said stipulation was admitted and read in evidence by Mr. Gates, the same being in the words and figures following, to-wit:

121 STATE OF INDIANA, *County of Marion, ss:*

In the Marion Superior Court.

No. 46388, R. I.

JACOB NEWMAN ET AL.
vs.
HARRY B. GATES.

It is hereby stipulated and agreed between the parties hereto that Zeno T. Griffin if personally present in Court would testify and this stipulation shall have the same effect as if said Zeno T. Griffin were personally present in Court and did testify that he is and was at the time of the trial of the cause of Newman, Northrup & Levinson *vs.* Harry B. Gates in the Circuit Court of Cook County, Illinois, being the same cause and the same trial wherein the plaintiffs recovered against the defendant the judgment herein sued upon, a shorthand reporter in said Court and reported the said trial of said cause in said Circuit Court of Cook County, Illinois, and took down the proceedings upon said trial and all the evidence given therein in sho-thand and that from his shorthand notes he had transcribed the said proceedings upon said trial, which said transcript is attached to this stipulation, and that refreshing his recollection by his said shorthand notes and comparing the same with said transcript hereto attached that said transcript truly and accurately represents and sets forth all of the evidence given upon said trial and all proceedings in Court upon said trial and that the questions therein set forth were asked and the answers therein set forth were made and given and the statements of counsel therein set forth were made as they appear in said transcript; and that
122 said transcript may be offered in evidence as the testimony of said Zeno T. Griffin as to the proceedings had and the questions asked and answers given the same as if said Zeno T. Griffin were personally present and testifying thereto, subject, however, to the right of the defendant to object to the introduction of the whole or any part of said transcript.

BAKER AND DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Attorneys for Harry B. Gates.
CHARLES MARTINDALE,
Attorney for Plaintiffs.

Mr. E. E. GATES: Now, may the court please, the defendant offers in evidence the transcript of Zeno T. Griffin the Official Shorthand Reporter who made the stenographic report of the evidence taken

upon the trial of the case on the Pleas that have just been read to the jury.

123 Mr. KETCHAM: Now, may the Court please, the plaintiffs object to this evidence for the reason that it already appears from the testimony, the evidence that has been introduced by the defendant, that there was a trial and adjudication of this matter in the Circuit Court of Cook County, Illinois, and that it is not competent under the provisions of Article 4, Section 1, of the Constitution of the United States to impeach or contradict, or to attempt to impeach or contradict the force, effect and scope of that judgment by parole proof, which this is. That Article, as your Honor is aware, provides that full faith and credit shall be given in each State to the judicial proceedings of every other State; and the plaintiffs object for the reason that to attempt to show by parole proof that the matter in question was not adjudicated in the Circuit Court of Cook County, is to deny full faith and credit, as required by the constitutional provision in the Constitution of the United States, to a judicial proceeding in the Circuit Court of Cook County, Illinois.

The COURT: The Court was of the opinion that before that that was a matter of law, but the Appellate Court said it was a matter of fact, and that is the law for me to be governed by, and the objection is overruled.

To which ruling of the Court, the plaintiffs, by counsel at the time excepted.

So the said testimony and transcript of Zeno T. Griffin, official reporter, as aforesaid, was admitted and read in evidence, the same being in the words and figures following, to wit:

124 In the Circuit Court of Cook County, — Term, A. D. 189–.

NEWMAN & NORTHRUP
vs.
A. B. GATES and HARRY GATES.

Stenographer's Transcript.

CHICAGO, *July* 13, 1893.

Index to Witnesses.	Direct.	Cross.	Redirect.	Recross.
Jacob Newman				
S. O. Levinson				
George W. Northrup				
Harry B. Gates				
Horace K. Tenney				
Levi Mayer				
E. M. Asheraft				
Homer Cook				
Harry B. Gates				

Recalled
Wm. D. O'Brien.....
John M. Condit.....
George W. Catterson.....
Chas. Shackelford.....
C. T. Heydacker.....

GRIFFIN BROTHERS,
Stenographers and Notaries,
No. — La Salle Street, Room 80, *Chicago.*

125 STATE OF ILLINOIS, *Cook County, ss:*

In the Circuit Court of Cook County.

NEWMAN & NORTHRUP
vs.
A. B. GATES and HARRY GATES.

Be it remembered that on the trial of the above entitled cause before the Hon. Frank Baker, Judge of said Court, on the 13th day of July, 1893, the plaintiffs to maintain the issues on their part introduced the following evidence:

Present, Edward J. Budd, Esq., attorney for Plaintiffs. Judge Olds, attorney for defendants.

JACOB NEWMAN one of the plaintiffs being called as a witness in his own behalf and duly sworn, was examined in chief by Mr. Judd and testified as follows:

Q. What is your name?
A. Jacob Newman.
Q. What is your profession?
A. Lawyer.
Q. Where doing business?
A. In Chicago, Illinois.
Q. Alone or a member of a firm?
A. A member of a firm.
Q. What is the name of the firm?
A. Newman & Northrup.
Q. Who composed that firm?
A. Jacob Newman, George W. Northrup and S. O. Levinson.
Q. Was the firm constituted that way in November, 1892?
A. Yes sir.
126 Q. In the same membership?
A. In the same membership.
Q. Are you acquainted with A. B. Gates and Harry Gates, the defendants in this suit?
A. I am.
Q. Please state to the court how you became acquainted with them and under what circumstances?

A. On or about the 22nd of November, 1892, they called at my office in Chicago and presented this letter.

The COURT: They both together called?

A. Both together.

Mr. JUDD: They presented this letter which you hold in your hand?

A. Yes.

Q. At that time?

A. Yes.

Mr. JUDD: I offer that in evidence.

The WITNESS: That is the first time I had ever seen the gentlemen or known them.

Mr. JUDD: It is a letter of introduction to Messrs. Newman & Northrup by Messrs. Morris, Newberger & Curtis, attorneys at Indianapolis, introducing Mr. A. B. Gates, and states he is President of the Indiana Corporation which has all its property in Illinois, and an assignment is an immediate necessity and that after consideration of the facts the only way to get the assignee in indisputable possession was to have the assignment made in Illinois.

Q. State to the court what transpired between you and Mr. Gates after that and what you did for these gentlemen?

A. They presented the letter and stated to me the condition of the corporation.

Q. What was the name of the corporation?

A. The American Mortar Company; it was organized under the laws of Indiana and that Mr. A. B. Gates was a heavy creditor of the corporation and that he desired that Harry Gates should
127 become assignee; I advised against Harry Gates becoming assignee but after a long consultation the old gentleman insisted upon it and I told him the dangers and my objection to it and I finally yielded stating that I would not take the responsibility of the assignment to Harry Gates because he was the son.

Q. What was the objection at that time?

A. My objection was that he was the son of A. B. Gates and Mr. A. B. Gates was the President of the corporation and also creditor; that it would result in a great deal of suspicion and talk on the part of creditors; that it was not a prudent thing to do; I advised him to take one of the Trust Companies but he was opposed to it and the additional objection was that Harry Gates was a non-resident of this State and I told Mr. Gates and Harry Gates that I was satisfied that if an- sort of a-tack was made by the creditors the Court would remove him on that ground alone—on the ground of non-residence; but they both said that they would take their chances in having Mr. Harry Gates appointed.

Q. What did you do?

A. The deed of assignment was prepared.

Q. Who prepared that?

The COURT: Prepared in your office?

A. Prepared in my office. I don't know whether I wrote it out personally, but it was prepared under my direction and I am inclined to think that I wrote it myself. It was prepared under my

immediate direction and then Mr. Levinson of our firm was dispatched, I think, with Harry Gates to Waukegan, where this property was located and to take immediate possession. I gave them instructions what to do and how to do it so as to prevent this estate from being dissipated.

128 Q. What was the nature of the property?

A. It consisted of a manufacturing plant. The business of the corporation was the manufacture of mortar; a plant on the Lake Shore and also scows and tugs that were used in handling the stuff on the lake. That is about the substance of it.

Q. You say a member of your firm was sent up there to complete the assignment and take possession of the property?

A. Yes, sir.

Q. What was done next when this assignment was made?

A. Both the gentlemen told us that they wanted us to act for them and take care of their interest. Then the usual work was done, preparing the petition, filing accounts, consulting with creditors, attending to labor claims, filing assignees' reports and advertisements, and I suppose from December 22nd until sometime——

Q. November, you mean?

A. November, yes 1892, until sometime in March, 1893, taking into consideration the consultations that we had with the creditors, that probably the time consumed all in all would be from two to three weeks. Now, by that I mean—I do not mean the full ten hours a day or eight hours a day but substantially a day.

Q. Used up the bulk of the day?

A. Yes.

Q. What a lawyer calls a day's work?

A. Yes. Now, Mr. Harry Gates was here very little of the time. He was at Indianapolis most of the time; I do not think that he was here more than four or five times and then only a day or two at a time prior to the time of the sale; I have no data by which to guide me on that, but that is my best judgment, so that for that reason we had to take his place and do the work.

Q. You were the attorneys for the assignee and you also with the exception of these four or five days, did the work of the

129 assignee?

A. Of the assignee.

Q. Also acting as attorneys?

A. Trying to adjust the conflicting claims, a thousand and one things. Guarding the property there and seeing that it was cared for.

Q. What were the assets—the value as it developed during the assignment proceedings, or the assets?

A. These gentlemen told me they were in the neighborhood of $50,000. My recollection is from forty to fifty thousand dollars, and that they had put into the thing over $75,000.

Q. But that the assets were worth over $50,000?

A. Yes, $50,000, but that they were incumbered with a mortgage something in the neighborhood of $11,000 in favor of A. B. Gates.

Q. You have stated about the filing of a petition and approving of labor claims—is there anything else that you can recall now as to the details?

A. In a rough way—Mr. Levinson can give the details nearer than I can because he has supervision of the books; I can read substantially what the services were.

The COURT: If you know about that.

A. Yes, I knew what was done somewhat, but in the matter of bookkeeping that is more especially in his charge. If you desire I will read this; this is substantially a statement of what was done.

Mr. JUDD: State what was done and use that memorandum to refresh your recollection as far as you know from independent knowledge that that was done.

Mr. OLDS: That is not legitimate.

The COURT: I don't think you can read the paper. In a general way, if you desire, Mr. Newman can state what was done.

130 Mr. JUDD: Mr. Newman, when did your connection with this estate terminate? When did you cease rendering services to Mr. Gates?

A. Sometime in March he told me——

The COURT: Mr. Harry Gates?

A. Mr. Harry B. Gates. I said to Harry B. Gates "It looks very much, Mr. Gates, as though you did not wish us to act for you any further; that you have practically retained Whitney & Upton at Waukegan." And Mr. Gates says in a laughing way "I guess that is about the size of it." I said to him "Very well, then, of course we are not to act for you any further;" "Well," he says, "guess that is about the way of it." That is the language he used.

Q. Anything said about pay for your services between you and him at that time?

A. Before the sale I had several negotiations with Mr. Harry Gates who was the only party I saw and I said to him before the sale that I would like to have the amount of our compensation fixed because Mr. Gates gave me to understand that the property would not bring a thousand dollars at the sale. The sale was arranged in this way, that only the interest of the assignee should be sold, and that the sale should be made subject to A. B. Gates' mortgage on the property and in view of that Mr. A. B. Gates and Mr. Harry Gates told me that it would not bring over a thousand or fifteen hundred dollars. I told him our fees ought to be settled, adjusted; I wrote him a letter on the subject and afterwards I talked with him in my office about the letter and the subject matter of fees. I told him that I thought the services taking everything into consideration, were worth $2,000. That would include all costs and all the money we had paid out in the way of advancements for him and he said no.

131 He wrote me a letter once on the subject and said that I must have made a mistake of a cipher and we discussed the subject and I said to him "Very well, Harry, I am willing to do anything that you think is right;" I said to him then "Harry, I will take $1,500. I don't want any row with you and I don't want any trouble; I will take $1300." And he says "I don't want to fix your fees;" and I finally said to him in my office "Mr. Gates I will take anything you say rather than have any trouble; anything that you can honestly say is a fair and just compensation for these services."

Mr. Gates replied that he did not think he was competent to fix the value of our services and did not wish to do so.

Q. Have you ever received any pay from him whatever or Mr. A. B. Gates?

A. No, sir.

Q. Have you paid out sums of money and made disbursements from your own pocket in this matter?

A. Yes, sir.

Q. Have you been repaid this amount?

A. No, sir, not unless Mr. Levison has received something that I know nothing of, not on the book. I am pretty sure nothing has been received without having gone through the regular course of business.

Q. Mr. Newman, how long have you practiced in the city of Chicago?

A. 17 years.

Q. Do you know the value of what is customary for lawyers practicing in the city of Chicago to receive for various kinds of services?

Objected to. Objection overruled.

Q. What would be the customary compensation for attorneys for such services as were rendered by your firm in this matter?

132 A. Gaged by what charges are made for like matters in this county?

Q. Like matters.

A. And especially in the Court of Cook County the services are reasonably worth from $1500 to $2000.

Cross-examination.

By Mr Olds:

Q. Mr. Newman, I would like to get just what was done as near as I can. In the first place papers were drawn up for the assignment?

A. Yes.

Q. Now, you were not present when they were completed just before your partner started with Mr. Gates to Waukegan, were you? They came to the office before you were there in the morning and they were practically completed before you got there?

A. That is not my recollection although Mr. Northrup and Mr. Levinson may have prepared some papers.

Q. They came there in the morning and they were completed and they went to Waukegan the same day?

A. Yes, the same day.

Q. One of the firm went along with them?

A. Yes, sir.

Q. And that was all that was done at that time?

A. No, I think that Harry B. Gates went alone and that A. B. Gates remained and I talked with him the greater part of the day, about the condition of the company, how best to manage the matter so as to avoid an attack, a needless attack of creditors and upon the subject of his security.

Q. Why, Mr. Newman, didn't A. B. Gates go to Waukegan with Harry B. Gates upon that day?

A. That is not my recollection; then it may have been that I talked with Mr. A. B. Gates the next day; I am not sure about it, but I know I had a long conversation with him.

133 Q. Let me refresh your recollection; isn't it a fact that A. B. Gates went to Waukegan with Harry B. Gates and your partner upon that day and that both of the Gates went home upon that night or A. B. Gates went home from there?

A. That is not my recollection.

Q. Well, now, your recollection is that the conversation and talk about the condition of affairs was with A. B. Gates, the father?

A. Both until Harry left.

Q. Harry B. Gates had no interest in the concern at all had he—and he was not even a stockholder?

A. That I do not know.

Q. You do not know how that was?

A. That I do not know, but he was more active than his father was in the talk.

Q. The letter of introduction that you have shown was from a respectable, leading firm of Indianapolis?

A. They came very highly recommended.

Q. He came there and he employed you?

A. They both employed us.

Q. He employed you, didn't he?

A. No, sir, both employed us.

Q. He was the responsible man you would look to for fees, wasn't he?

A. No, I looked to both of them.

Q. Mr. Newman, do you mean to say that Harry B. Gates was assuming at that time an individual responsibility in employing you?

A. I don't know what he was assuming; I am telling facts.

Q. Do you mean to say that he employed you that day and personally obligated himself to pay you attorneys' fees in that matter?

A. That is the fact; I can only give you the facts. Whether he assumed a personal liability is a question for his Honor to decide, not for me; I can give you only the facts. I want to say this

134 in connection, that Mr. A. B. Gates was inclined to take my advice and have another assignee appointed but Harry B. Gates insisted that he must be the assignee and it was through his persistence that I finally yielded.

Q. Mr. Newman, who else was there that morning, that time, that day, the time of the assignment—some other stockholders, wasn't there?

A. I have no recollection of any other stockholders. Somebody may have come into the office but I have no recollection of any other stockholder.

Q. Do you know Mr. Condit, James Condit?

A. Not personally; I would not know him if I saw him.

Q. Don't you know he was one of the stockholders in that company?

A. I learned either at that time or in the subsequent conversation that he was.

Q. Evans Woolen was another stockholder—was he there that morning?

A. No, sir, not when I was present; I mean to say that I did not see him or know him.

Q. You did not see anybody until services were commenced, did you?

A. After, no, sir.

Q. Isn't it a fact that upon that morning that James Condit and Evans Woolen and Hewitt Howland and A. B. Gates, stockholders in that company, came in there with this letter of introduction and arranged with you to conduct the business?

A. Mr. Woolen and Mr. Condit never exchanged a word with me in their lives; I never saw them—I never met them; I would not know either gentleman at any time.

135 Q. Weren't they there during all the time that A. B. Gates was there upon that day?

A. Not to my knowledge. Not so far as I know; they may have been there early in the morning before I reached there; I cannot say as to that.

Q. Now, you say that both of these gentlemen said they wanted you to act for them. What did Mr. Harry B. Gates say?

A. I do not want to use that language. Both instructed me like two men coming together upon the business in which they seemed to be both jointly interested.

Q. You do not remember what was said at all?

A. I cannot recollect specifically, no.

Q. Now, after the assignment what next was done?

A. Taking possession, filing the deed, having it recorded, and the usual work.

Q. What did you do in connection with that?

A. Mr. Levinson can tell you more; tell you all.

Q. Did he go to Waukegan before the order of sale was granted?

A. O, yes, he went the same day.

Q. But from that time up until the order of sale was granted did he go up there?

A. O, yes, a number of times.

Q. How many times?

A. I cannot say; he can give you the fact as to that.

Q. Mr. Levinson gave particular attention to the business?

A. He attended particularly to the details under my direction.

Q. Under your direction?

A. Yes.

Q. Well, he was there at the time of the sale, was he?

A. Yes.

Q. Do you remember what occurred there the day of the sale?

A. Nothing, except as it came back to me from Mr. Levinson and from Mr. Harry B. Gates.

136 Q. For whom was the property purchased for?

A. For?

Q. Yes.

A. I will tell you——

Q. It was a sale of the property, wasn't it?

A. On the day of the sale I said to Mr. Levison—I don't know whether this is proper—I gave him instructions what I wanted done, will you permit me to say what instructions I gave him as to what he should do at the sale?

Objected to because the witness says his employment terminated before the time of the sale when he says he was discharged or substantially discharged by Mr. Gates.

The COURT: That was after the sale? Was that after the sale or before the sale that you and Mr. Gates had this talk?

A. Oh, months before the sale; the sale did not take place until some time in March or April.

The COURT: This conversation was in March?

Mr. JUDD: The conversation with Mr. Gates in which he told you he had employed Whitney & Upton?

A. That was after the sale or about the time of the sale, when he told us we were no longer acting for him. I prefer, Mr. Judd, to tell the whole.

Objection withdrawn by Mr. Judd.

A. I told Mr. Levison that I was satisfied from my conversation with Harry B. Gates the day before in my office—he came up to my office the day before that our talk took place at my office two days before the sale and I turned to him and stated how the sale was to take place and tried these two days before the sale to make a settlement with him with reference to our fees. It was at that time this conversation took place when I said to him that I would be satisfied rather than to have any trouble about the matter that he
1137 should fix the fees himself. He would do nothing one way or the other; he would not even say what he thought was proper and right and I remember some little things he said at this time; among other things he said that his father was negotiating with Mr. Condit by which Mr. Condit was to purchase his father's mortgage on that property and in the afternoon Mr. Gates told me he had received a telegram with some advice from his father that the sale from A. B. Gates of the mortgage to Mr. Condit had been consummated and that his father had received five or six thousand dollars, I do not remember the exact amount. I became satisfied from this circumstance and some little things that Mr. Harry Gates said that it was preconcerted to leave our firm out in the cold with respect to the fees, because Mr. Gates told me he expected Mr. Condit to buy this property in for about a thousand or from a thousand to fifteen hundred dollars because the sale was made not free and clear of the mortgage and liens but subject to all these mortgages and liens and that nobody would take that property subject to those liens and pay any considerable amount for it. I became satisfied that there was an understanding between the parties that we were to be left out in the cold.

Q. What were the assignee's expenses up to that time?

A. He told me himself that he had paid out between eight and nine hundred dollars. Then I told Mr. Levison that I was satisfied that there was a combination and the result of which would be that Mr. Gates would get his eight or nine hundred dollars which he claimed to have paid out and some of the additional labor claims would be paid but that we would get nothing without a lawsuit. So I told Mr. Levison to attend the sale and get some advice as to the value of the property and if possible to prevent Mr. Condit
138 from buying it for we had felt that that was in the line of our duty to see that the assignee got as big a price as possible and if he could not induce any other person to buy the property, to buy it himself. Those were my instructions so that the property would not be dissipated, and that it should bring the biggest price possible. Now, as to what he did up there I only know what he told me.

Mr. OLDS: You communicated with him by telephone while he was there?

A. Yes, he called me up once or twice.

Q. And you gave him those instructions that you have been talking about by telephone?

A. No, sir.

Q. In this conversation that you had with Mr. Gates——

A. When I say no Judge, I desire to say that the subject matter of my instructions in the morning before he went up was discussed through the telephone but the chief object of the talk by telephone was whether he should pay $500 down on the purchase and I told him to go ahead and to draw a check for that amount.

Q. As a matter of fact now, didn't Mr. Gates come up the day before the sale and in that conversation that you were talking about fees, didn't he tell you this, that he personally could not assume any responsibility whatever but that any amount that the Court would allow you there he would not contest?

A. He said not the first part but he did say "I will not fix your fees; whatever the Court allows you I will be satisfied." But nothing was said about any personal liability either by him or me at that interview, though I wanted him to pay me; I think my letter to him weeks before the sale stated I wanted our fees fixed and paid
139 long before the sale.

Q. Did you say anything to him about holding him personally responsible at any time?

A. The word personally was never used.

Q. I ask if you do not know that it was a fact that Gaffney and Long bid $5,500, a *bona fide* bid for that at the sale?

A. That is not my information.

Q. You do not know personally anything about the amount of bids there?

A. No, sir, but Gates told me or Levinson told me what Long or Gaffney and O'Brien told him. I can tell you what occurred at my office between them.

Q. Gaffney and Long?

A. Yes.

Q. They put in a bid there and were proposing to hold the property under the bid, weren't they?

A. No, they came on the train back from Waukegan with Mr. Levison and came to my office. Mr. Levison's bid, I think was $2,700, or somebody bid for him, I don't know which, whether he bid in his name twenty-seven hundred and some odd dollars. Gaffney and Long wanted the property; they offered to pay us for our bid as soon as they could get possession of the property, I think it was $3,800, and I made an agreement with them that if we got possession of the property, I would sell it to them for that amount; and they bid and I think paid in their funds a deposit of either five hundred or a thousand dollars.

Q. You retain that yet?

A. No, sir, ½ of it.

Q. Was that O'Brien or Gaffney alone?

A. I don't remember there were two or three of them.

Q. Mr. Newman, isn't this the fact that there was no discharge of you at all as attorneys; that you talked with him and that
140 your partner, Mr. Levison went up there with him as his attorney, as representing the assignee the same as he had up to that sale, and that these parties came in there and Gaffney and Long both bid $5,500?

A. I never heard of that. There must be some mistake about that.

Q. Or the party whom your firm had procured to bid overbid and it was struck off to them and they refused to comply with the bid and under your firm's directions or Mr. Levison's, the property was re-offered—or under somebody's direction there at the time the assignee re-offered it and then Levison came in there to bid?

A. They declined to bid against him.

Q. And that he overbid them anyhow he was a by bidder and refused to bid and it was worked off to Levison?

A. That is not what they told me.

The COURT: You were not there?

A. No, sir.

Q. You do not know then?

A. No, sir.

Mr. OLDS: This was not reported to you by your partner?

A. O, yes, Mr. Levison and Mr. O'Brien, but he asked them to give $4,000 for it and they would not do it.

Q. Do you of your own knowledge know what expenses you were to—how much you paid out there as a matter of fact?

A. You mean at the sale?

Q. No, I mean as your individual expenses of the firm.

A. Our books will show that.

Q. That is, what was paid out appears on your books?

A. Yes, I want to say this: that both Mr. Levison and Mr. Harry B. Gates told me that at that sale they called each other all sorts of hard names and there was a bitter feeling.

141 Q. That resulted in Mr. Gates claiming that he was seeking to defeat a *bona fide* sale there?

A. Yes.

Q. You have spoken about a consultation with the creditors here?
A. Yes.
Q. And afterwards filing a petition for them in Court?
A. Yes, two creditors; one of them was the First National Bank of Waukegan or their cashier, I don't know which and then another concern here; that was after.
Mr. JUDD: That was after the employment terminating?
A. Yes, after my conversation with Mr. Harry B. Gates; it would not make any difference if it was; we were in the line of protecting the assignee as attorneys for the assignee at that time.
Mr. OLDS: They paid you for those services?
A. They haven't paid us anything.
Q. Is that part of the services you charged Mr. Gates for?
A. No.
Q. Do you pretend to say procuring the assignment, making out the papers for the assignment and going to Waukegan and filing them and obtaining an order of sale and attending the sale there, even if you were acting at that time, and with the consultations there that were had, was worth from fifteen hundred to two thousand dollars where there was about $3,000 of property involved?
A. Not as you state it, Judge.
Q. What was that service worth.
A. Well, I could not disassociate that from the other; I would have to take it altogether.
Q. What was the work now done so far as the filing of the petition?
The COURT (to Mr. Olds): You say that there was $3,000 worth of property; he says forty or fifty thousand?
142 The WITNESS: Yes.
The COURT: That would make a great deal of difference, practically it would make a great deal of difference. In an assignment of $3,000 he would not get as high fees for the same work as if it was for $100,000.
Mr. OLDS: That is what I am trying to get at.
The COURT: Is there any basis for that assumption?
Mr. OLDS: The basis is that the sale was that.
The COURT: If it was sold subject to mortgages or that kind of thing. There might be a plant; if there was a plant subject to mortgages that is another thing. Let us get at the facts as they are, whether the whole company's plant was worth $3,000, or whether it was more and encumbered by that mortgage.
The WITNESS: Both gentlemen told me that they had paid in $75,000 in cold cash for the plant at Waukegan.
Mr. OLDS: Did you know the amount of the mortgages on the premises?
A. The one that was sold to Mr. Condit by A. B. Gates was between five and six thousand dollars. My recollection is that there were three mortgages sent up there from Indianapolis the day before the assignment was made and recorded at Waukegan in favor of the officers of this corporation.
Q. Do you know the amount of them?

A. I could not tell you without looking at the books and papers; but my judgment is between twelve and fifteen thousand dollars.

Q. Twelve or fifteen thousand dollars of mortgages?

A. That would be my guess.

Q. And the property above that subject to them sold for something less than $3,000?

143 A. No, in addition to that there was either five or six thousand dollars mortgage on the scow in favor of A. B. Gates, which had been placed on that scow or tug, that is upon the tug a year before and my recollection is that the mortgages aggregated between fifteen and twenty thousand dollars on the property; that is pretty nearly right.

Mr. LEVISON: That made the liens together between fifteen and twenty thousand dollars?

A. And the sale was made subject to this burden on the property so that any man who bought the property at the sale, took it burdened with all this encumbrance upon it; and in addition to that they had a lease and of course the plant would be worth nothing; any man who bought it at that sale would practically be out in the cold unless he got the assignment of the lease from the Waukegan Belt Road and the lease itself prohibited the transfer; I took the position, however, that the transfer being one by operation of law and not by the act of the parties, and that kind of a transfer not being expressly prohibited by the lease, I thought it was good but it was a debatable question, and a very close question, that is that the assignment and a sale by the Court was an assignment by operation of law.

Mr. OLDS: You were speaking of Whitney & Upton; isn't it a fact that your firm retained them in connection with this business?

A. I think Mr. Levison did.

Q. Then they continued to act?

A. After the sale—perhaps a week after the sale or it may have been two weeks, Harry Gates, Mr. Levison and myself—went up to Waukegan and there it was understood between Whitney

144 & Upton they were representing Mr. Harry B. Gates—turned everything — to them and they told me so before. Mr. Gates so stated that Mr. Whitney had represented him in Court.

Q. Upon that occasion now, in their presence there, wasn't it suggested by you that you go up to Court and that you have the Court fix an allowance of your fees in the matter?

A. Yes, I did say that to Mr. Upton; I want to say Judge that I did that for it is the practice in this County that the County Court always allows counsel fees and assignee's fees out of the estate. They would not allow anything there; they objected to it—Whitney & Upton.

Q. Do you say that the Court refused to allow anything?

A. No, Mr. Whitney and Mr. Upton.

Q. You never made any effort to have any fees allowed by the assignee?

A. No, there was no money in the estate.

Q. By the way, in this conversation when A. B. Gates was here

and you were representing his interest in reference to the mortgage, you were attending to his whole interest in the matter, were you not, and some of the other mortgage creditors?

A. Now, I want to quote just what was said; I talked with them both about the general situation; I did not at that time know that the mortgages had been filed the day before—that is my recollection, because I would have told them at once that if the creditors attacked that mortgage——

Q. You knew Mr. Gates had that mortgage?

A. Oh, I knew he had a mortgage.

Q. You were to represent his interest—all his interest in
145 the matter, weren't you? He was an individual stockholder in the company and he had a mortgage there and you were retained in his interest?

A. They both asked me to represent their interests.

Q. You were retained by A. B. Gates' interests, weren't you?

A. I think it is only fair for me to say that it was my understanding that if anything arose in the way of attacking these mortgages, I was to represent and take care of his interest, but nothing occurred which necessitated that while I occupied that relation.

Redirect examination.

By Mr. JUDD:

Q. Mr. Newman, you knew that Cook and Upton and not Whitney & Upton represented that mortgage in some features and filed a petition to foreclose it?

A. The first mortgage?

Q. I mean filed a petition in this assignment proceeding?

A. Yes.

Q. In the nature of a foreclosure suit?

A. Yes.

Q. Attempted to foreclose it?

A. Yes, thorugh Mr. Condit's advice the old gentleman retained—or I guess Harry for the old gentleman retained Cook & Upton of Chicago and they filed a petition.

Q. That is they attempted to foreclose in this assignment proceeding?

A. In the assignment proceeding at Waukegan.

Mr. OLDS: You do not pretend to say that you have any knowledge that Harry B. Gates retained Cook & Upton for his father?

A. I do not want to be understood as saying that, but Harry himself told me that it was through the advice of Mr. Condit
146 that he retained Cook & Upton.

Q. He did not say that Cook & Upton had anything to do with that?

A. I got that impression but I cannot recollect anything he said; I got that impression but I could not recollect anything. But I recollect that Harry B. Gates told me he had talked with Cook & Upton about that.

S. O. LEVISON, a witness for the plaintiffs, being called and duly sworn, was examined in chief by Mr. Judd and testified as follows:

Q. Your name?
A. S. O. Levison.
Q. Profession?
A. Attorney.
Q. Practice in Chicago?
A. Yes.
Q. What firm?
A. A member of the firm of Newman & Northrup.
Q. How long have you been a member of that firm?
A. Since the first day of March 1892.
Q. Are you acquainted with Harry B. Gates and A. B. Gates, the defendants?
A. Yes.
Q. When did you first become acquainted with them and how?
A. On the morning of the 22nd day of November, 1892, I came down to the office between half past eight and nine and I found some gentlemen there whom I did not know, I think in Mr. Newman's private room talking with Mr. Northrup. After doing some preliminary work I went in; I have general charge of the work in the office; I went in to ascertain who they were and what they wanted and I found this letter from Morris, Newberger & Curtis. Mr. Newman came a little before nine; before he got down we did not talk the matter over until Mr. Newman came—and we were telling them they should wait until Mr. Newman came and after-
147 wards Mr. Newman came in. In that connection I wish to state that I do not think Mr. Woolen was there—I do not think he was there when Mr. Newman was there—he came in once but he did not stay long.
Q. Who else was there?
A. Mr. Northrup, A. B. Gates, Harry B. Gates and myself; those were all the parties. Mr. Newman wrote the deed himself—I think Mr. Newman wrote the deed in his own hand-writing. The deed of assignment was prepared, I was in the room at the time and it was arranged that I should go to Waukegan with the two gentlemen. I will say that I went with both of them—both Harry B. Gates and the old man Gates—on the 11:30 train on the 22nd of November to Waukegan. We got to Waukegan at half past 12 and went to the Recorder's office. It is my recollection that the Recorder's office was closed up, being the lunch hour, but a man there attended to us. In looking over the papers I found some mortgages of the American Mortar Company. There were some mortgages filed there marked, filed the day before if my recollection is correct. That is the first that I had heard of them; they were not spoken of in our office. I examined the mortgages and found they were chattel mortgages to A. B. Gates and a Mr. Woolen, who had been in the office. I began to think of the question in the Farwell decision and I telephoned down to our office and told them that I did not know whether it would be wise to make an assignment because here

were mortgages made by this company which reached Waukegan the day before. But Mr. Gates, the old gentleman, said to go ahead any way and I could not reach Mr. Newman. Then the letter from Morris, Newberger & Curtis, was imperative that an assignment should be made and although I objected Mr. Gates said that was the only thing to do.

Q. Both Gates- were with you?

148 A. Yes, both with me all the time, and then we went back to the Court House and filed the deed of assignment and took it into the County Court and filed it and returned. We consulted and talked the matters over and then arranged about Harry taking possession. I don't think I went out to the plant with him that day. In addition I want to say that there had been an attachment two weeks prior by a Milwaukee concern on some dump-cars belonging to the company. There were some local attorneys looking around while we were making the assignment and I feared might commence attachment; and perhaps an hour after I recorded the assignment, one did levy an attachment on the company's property. It was that additional fact—that I heard there were attorneys about to make an attachment—that hastened our decision to make the assignment. I do not recollect whether Mr. Gates went back to Indianapolis that night or not, so that Mr. Newman may have spoken to him in the morning.

Q. You went back to Chicago that evening?

A. I cannot state the hour. We represented the assignee all along during the administration of the estate. The first thing that Mr. Gates represented to me, the next day after we got down from Waukegan that I remember, that the laborers, the tug laborers had possession of the tug and refused to give possession of it to him as assignee until their wages were paid; so he asked us what to do; and after consulting with Mr. Newman we prepared a petition, asking that the assignee be allowed to pay the laborers and to get possession of the tug, Mr. Gates saying it was necessary to get possession at once. We prepared a petition. I went to Waukegan and prepared an order after some talk with the Court, allowing the assignee to pay the laborers.

Q. Was Mr. Gates with you then?

149 A. I am inclined to think that he was along; Harry Gates was along the first time because he had to pay the laborers; the assignee had to advance three or four hundred dollars. Then I prepared receipts for the laborers to sign, after Harry Gates paid them off so he would have something to show that they hadn't any further claim or lien. The next thing that was to be done, the sheriff had levied an attachment writ an hour after our assignment on some property that was in the possession of the assignee.

Then we prepared a petition asking for a rule on the sheriff of Lake County to show cause why he should not be attached for contempt. We prepared such petition and I went to Waukegan and served notice on the sheriff and a copy of the petition and went to the Court with a number of lawyers, Whitney representing the sheriff and Heydacker and three or four other lawyers that were in-

terested in the attachment suit. We had some argument and talk with the Judge and finally set the matter down. On the hearing we came to an agreement and prepared orders accordingly that the property attached by the sheriff subsequent to the assignment should be turned over absolutely to the assignee; that the property attached prior—about two weeks before the assignment—should be turned over to the assignee, subject to whatever right the attaching creditor had. There was some argument. I was up there two or three times on this matter and finally we procured the order and the matter was finally adjusted and Mr. Harry Gates made his own custodian the watchman. Then we prepared publication notices and published the same in the Waukegan paper, the "Patriot," a notice under the statute to creditors to prove up their claims.

Q. Mr. Levison, state what was that nature of the property composing this establishment,—of this Mortar Company.

150 A. The property consisted of a manufacturing mortar plant, which plant consisted of the lease of a large strip of land, and there was also what is called "The slip" a little harbor that is cut in so that they can reach there, and tugs to get the sand, and several buildings and machinery of various kinds.

The COURT: Engine and boiler?

A. All such things. I remember particularly because we had the items in the inventory; the inventory was a long affair. And in addition there were some outstanding accounts, I do not think they exceeded a thousand dollars, and then the tug and scows.

Q. How many scows were there?

A. I think there were three scows—there might have been four; there were a few scows.

Q. Not in use?

A. Yes, sir.

Q. And three in use?

A. I think three in use and there was some trouble about them—it was a very complicated estate. There was one about which they said there was a controversy, that was valued at $1500.00 before the assignment, and a Milwaukee firm had written down threatening proceedings unless that scow was returned; that was one of the numerous complications. I want to answer your question; the property was said to be worth any where from thirty to fifty thousand dollars. Mr. Harry Gates told me repeatedly, that $72,000, as I remember was the highest figure, because he told it to me so many times; I was quite intimate with him; we often went out to meals together. That about $72,000 had been invested in this estate of which his father had invested a very large fund.

Q. Now you have got to where you stated advertisements were published in the "Patriot?"

151 A. Yes, and then we prepared under the statute notices to be mailed to all the creditors of the estate. I prepared the form of them and I think we struck off a lot of copies in our office, but I think that Harry Gates mailed them in Indianapolis. The office of the assignee was at our office, Room 802, Chamber of Commerce Building, because having the office here was a saving of rent in Chicago, and because Harry Gates lived in Indianapolis and was

ver[illegible]arely here, and there had to be some place where the creditors or debtors were able to come and find the assignee and file their claims; I think however that Mr. Gates himself mailed the letters from Indianapolis instead of here and then Mr. Gates said he had a number of men there and lots of time to send them.

Q. In the meantime had the assignee given a bond or not?

A. Oh, yes. Before that I had some conversation about a bond of the assignee and the Judge decided that he wanted a bond filed before he would enter any more orders in the estate; he did not like to enter any more orders until he had filed a good bond. And as the assignee was a resident of Indianapolis, he wanted to know whether or not we knew of a suitable bondsman. We went around to find a bond, and finally I went over and talked to the American Surety Company. We assured the Company that Gates was good and that his father was good financially; that we knew him and that Mr. Gates would give him an ample indemnity bond, such as they required. We made arrangements with the American Surety Company and they signed the bond which we took up to Waukegan and had approved.

Mr. NEWMAN: Mr. Mason, of the Surety Co. came here and saw me personally.

152 The WITNESS: In this particular matter they consulted Mr. Newman about it more than myself.

Mr. JUDD: Now, as to the leasing of the scows and tug?

A. Harry Gates said he had an opportunity to lease those at a rental of $150 a week. The property was not paying anything then. Harry Gates said he should want to be fully protected in case the tugs and scows were lost by the lessees. And so we prepared a petition and had an order entered on it, giving leave to the assignee to lease the tug and scows, and we also prepared a bond running from the lessees to Harry Gates as assignee, to protect him in case the tug and scows were not properly returned or were injured or harmed in any way; a bond with sureties so that the assignee was fully protected. And that was all done at one time.

Q. Did you obtain an order to lease them from the County Court?

A. Yes. As I said they brought in $150 a week. In that connection, some time after that, it was reported that one of the scows was lost. I believe the lessee had returned or attempted to return the tug and scows, and that one of them had been lost and then I wrote to the assignee about it. He was not here during that time. I wrote him that a claim for salvage was put in by Mr. Condit, the manager of this company for $500; afterwards he reduced it to $200. After a great many negotiations and talks and considerable argument with Condit up in the office, we arranged to have the scows returned without any salvage whatever.

Q. What date was that?

A. I cannot fix the date but it must have been after January and before March.

153 Q. Did you file an inventory of the estate?

A. Yes, we filed an inventory as required by the statute at the same time that I took his bond up and had it approved and filed the assignee's bond.

Q. Who prepared the inventory?
A. Well, I prepared the inventory, assisted by some of the clerks.
Q. What was it?
A. The inventory set out in detail every piece of property of the estate; it also set out outstanding accounts, giving the names, residence and the amount of the claims and it also set out all the debts or creditors of the company. It was a voluminous inventory—a list of creditors and items.
Q. Did you divide them into classes? Labor claims and general creditors and lien creditors?
A. Yes, as usual.
Q. Had you made any assignee's report at the time of the inventory of the condition of the estate?
A. I think the report is embodied in it. I don't think there was a separate instrument; I know we reported the condition of the estate.
Q. And an inventory?
A. But whether they were separate documents or not I do not know; I know that we reported the condition in the report, and filled it out very carefully when we filed the bond, because the Court insisted upon having the inventory before he would approve the bond; he wanted to see what the property consisted of.
Q. Did you do any work in connection with the insuring of the property up there?
A. I do not remember what date, but very shortly after the assignment and I believe the first time that Mr. Gates came up
154 from Ind-anapolis and while we were at Waukegan, I asked him if he had placed any insurance on the property and he told me no. I told him that was extremely improper unless he wanted to create a responsibility and we went to all the insurance offices in Waukegan, at least three or four and not one of them would place any insurance and said that their companies would not place insurance on a factory not in operation and especially where it was in the hands of an assignee any way. When we got down to Chicago Mr. Zerbe made some further effort with some of the companies here and they said they would not write—that — would not place any insurance on such an institution; so I considered it necessary and immediately prepared a petition, setting out those facts to the Court so as to protect the assignee and stating it was impossible to get insurance and asking the advice of the Court in reference to the charge of the property, and then we had an order entered.
Q. Did you do this thing that you have told about at Mr. Newman's direction?
A. Yes. I said before that everything I did was under his direction. We were talking about insurance. The Court entered an order authorizing the assignee to employ a watchman to take care of the property at a price of $10.50 a week, in lieu of insurance, that being the best care we could take of the property and the watchman remained there in possession.
Q. Did you ever go to Indianapolis in reference to this matter?
A. About New Year's I was on a visit to my parents in Indiana, near Indianapolis; I did go to Indianapolis in reference to this

matter; I might have gone to Indianapolis any way but I had that in mind. I called on Mr. Harry B. Gates and his father,
155 and we consulted with reference to some adjustment of the estate. The affairs had become so complicated in the meantime, before this, a petition having been filed for a lien on this same tug for $1323 for coal, in addition to the other pending petitions. Then there were two or three other liens against this tug. Petitions were filed under our statute attaching water crafts and these were pending on demurrer. While in Indianapolis I told the parties that there were so many claims and complications in this matter that it was highly desirable to settle with the creditors. I thought they should and I thought the creditors would take a reasonable amount. And then we went over to Mr. Curtis who was at the Grand Hotel and we talked with him there and he thought it desirable to settle; I believe he was a stockholder; and I went back and saw the old man with Harry Gates. I spent altogether perhaps two or three hours.

Q. Did you make any other report—assignee's report, besides the one that went in with the inventory?

A. I will get to that. We then arranged, I believe, in Indianapolis, that we would make some offer to the creditors, they saying they would see us again in Chicago. Then perhaps the next step in the estate was the filing of the first report of the assignee. That was a lengthy report. I put in all the claims that had been filed with the assignee. We were almost a week preparing this. It contained also the names of creditors to whom notice had been sent, giving their residences and the publication notice.

Q. Is that the report? (Showing witness paper.)

A. That is the report. In the meantime a large number of labor claims came up. The assignee wasn't there and the laborers clamoring for pay, bothered the life out of me. I had to attend
156 to them.

Q. Did you ever file a petition to sell the assets?

A. I will come to that. The assignee came up after correspondence at Indianapolis, and it was deemed advisable by reason of the expenses of the estate, to sell the property. So we prepared a petition to sell all the estate or rather the interest of the assignee in all the property and assets and such petition was drawn and we went to Waukegan. I think Mr. Harry Gates was along and I think Mr. Condit was along. And after some argument—I think we were there an hour or so in the court room, arguing upon the necessity of the sale and stating to the Court the condition of affairs and the amount of the expenses—we obtained an order of the Court and the Court gave directions as to how the sale should be made. He said he wanted us to give publication of the notice or advertisement; so the sale was set for about the 17th or 18th of April. We took all steps so that full publication and advertisement of the sale were made.

The COURT: April or March?

A. April. Mr. Newman is mistaken about the date; it should have been April in place of March when we had the talk with Gates. I remember because I came back from Denver. I came back

for the purpose of attending this sale. I got back the same day Mr. Gates came up; Mr. Gates came up on Monday and the sale was Tuesday; he came up on Monday and we had some talk on Monday and Mr. Newman, Mr. Gates, Mr. Howland and myself went into Room 823 which was at that time Mr. Newman's private room in the office, and Mr. Newman told Mr. Gates first that he wanted $2,000 and after a long time I think Mr. Newman agreed to $1,500; and then he told him during that same conversation as Mr. Newman has testified that he knew that he wanted to do the square
157 thing and he left it to him to fix the fees; he would leave it to him rather than have any trouble—he hadn't had any trouble with clients and he didn't want it then. We expected Mr. Harry Gates back about five o'clock, but he telephoned up—there was some talk about the sale of the mortgage, as Mr. Newman has testified, about a sale of a mortgage by his father to Condit, and that he would be back to the office—but he telephoned up that he could not get back and was going to Waukegan. That fact together with what Harry Gates had said with reference to fees and the further fact that the father A. B. Gates had sold or was about to sell his interest to Condit, and we knew he did not have any money, led us to believe—Mr. Newman to believe—that things were not right; and he told me that evening—that was the Monday before, the sale was Tuesday—that he did not like the way things looked, they looked very suspicious. That they were going to get this property cheap and we would probably be beaten out of our fees, but that we would not submit to their buying the property at their own rate and he wanted me to see that the property was not sacrificed. So I went up the next day and we had a long talk. I don't remember everything that was said about the sale; I think he told me that rather than let Condit have it for me to bid. I got up there and the sale took place about one o'clock. I met Gates there when I got there. We were eating lunch at the hotel and Gates said to me, Levison, you haven't given me any instructions about the sale; I don't think that is the right way for an attorney to do." And I used some expression as that "You don't need any instructions, (I will go along with you; if you offer the property for sale, you make two or three lots of it and nobody will bid for a part of the plant; I think you ought to get the sheriff to auctioneer; he is familiar with Waukegan
158 property and people know him." He said he didn't know, he didn't think I had acted right at all. I don't know what I told him; I didn't intend to let Condit buy it for a song. Then we went to the sale and I found that he had already made an arrangement with Whitney & Upton; that they had given instructions and he had gone up there with his instructions and offered different property in lots and had concealed from me that he had been instructed. He had no time to be instructed from the time he left the lunch table until the sale of the property—until the property was sold.

The COURT: Who bought it?

A. Somebody from Chicago bought it—Howard & Birwin.

Q. For how much?

A. They bid it off—I have forgotten

Q. Did the assignee require it to be cash?

A. Well, they didn't have all the cash with them; they had $200. The assignee consulted with Whitney and they returned and they said they would insist on $500 and they said they did not have but $200.

Q. Said what?

A. They said they would offer $500. That they had made a purchase of the sheriff; that they had not been required to put up all the purchase money on the spot, but that they would pay the rest of it up as soon as they got to Chicago; we could go along down with them. Condit's man, young gentleman bid for Condit—I knew he was Condit's relative.

Q. Who was that?

A. He was the creditor—he was the man that filed the petition for discontinuance—his father lived at Evansville, Indiana, Mr. Hussey, —he did the bidding for Condit. Then the property was put up again for sale, and as I said, that when the property was put up for sale, the assignee announced all these mortgages in detail
159 and that the property was to be sold subject to these mortgages and read the amount. The mortgages and the liens all together aggregated as figured by the assignee to $16,500. That may be a little off but I think those were the figures he gave from the court house steps.

Mr. JUDD: In whose favor were these mortgages?

A. They were in favor of A. B. Gates and there were some other names, Condit and Howland. They were in favor of A. B. Gates and Harry told me that the old man had put up the "stuff" and he had to protect all these mortgages. Then young Hussey, representing Condit stepped up and said to him "I want to know about the lease; if we buy this property do we get the lease? There is a 25 year lease—do we get that?" The assignee said "You don't get it; you will have to make arrangements with the railroad company." And he substantially said that the assignee could not sell the lease —he did not pretend in the sale to sell the lease because the lease had been made by the railroad company. I stated at the sale upon the subject that the lease could be procured; it was a good transfer in law and that they need not hesitate to bid. The assignee insisted that he was not selling that. Then it was very clear from the commencement of the sale that it was the purpose not to get very much for the property. Then when it was put up the second time—I do not remember exactly what time—but the property was put up along at 12 or 1 o'clock—it was put up the second time—and I told the assignee I was going over to the telephone and I did not want him to sell that property until I got back; I thought I would bid more than anybody if he would wait. I went over to the telephone and communicated with Mr. Newman, and I wanted to know if I bid in the property whether I could draw a check on the firm as a cash
160 payment; and he told me to go ahead and use my judgment about it—that I was on the ground and ought to know about it. I went up there and the bid was $2,800 and I think I bid $2,900.

I think that was my bid. At all events, after the bid, Mr. Gates walked up and down the court house steps for about 15 or 20 minutes asking bidders to go over my bid, which was his duty. It was at least fifteen minutes that he tried to get a better bid and no better bid could be obtained. It was therefore knocked down to me. A great many obstacles were interposed to the confirmation of this sale, the mortgagees going behind the sale and investigating it. Of course we are not charging for these services. The objections were overruled and then the sale was confirmed and $500 was ordered for the assignee's compensation and Mr. Whitney at that time representing the assignee in regard to the exceptions and in regard to the confirmation of the sale. Condit, had, after the purchase by me, filed a petition as assignee of the mortgage, claiming that he had bought the mortgages from Mr. A. B. Gates, was the owner of them and wanted to foreclose them in this proceeding although he was present at the sale. The Court held he did not have any right to and then the sale was confirmed.

Mr. OLDS: Then you are not charging this up to the defendant?

A. No.

Mr. JUDD: You ceased your charges, I believe with the filing of the petition for sale?

A. And the sale progressed and the publication and other advertisements of the sale.

The COURT: Up to the date of the sale?

A. We did not put in our charges for what the assignee did before the sale because we afterwards found out we did not represent him.

161 Q. That is up to March?

A. Up to that Monday.

Q. When you found out that there was a clash?

A. Yes.

Mr. JUDD: What occurred at the sale and afterwards you made no charge for?

A. No, I have said March 17 or April 17 that was the Monday; I remember that.

Q. How long did it take you to prepare the inventory that you speak of?

A. Oh, altogether perhaps three or four days.

Mr. JUDD: I desire to offer that certified copy of the final disposition of the case at Waukegan, dismissing the case out of Court by consent of a majority of the creditors.

The COURT: I think that may go in.

Mr. JUDD: Is that all?

A. The reason why the assignee wanted to prepare a petition on his behalf for the sale of the assets, was as set forth here; that he had expended a large amount of money, between $800 and a thousand dollars and he did not intend to put in any more money; if the property was sold and brought that amount of money, why, he would have the first claim on that and he did not think that it would bring any more than that at the sale.

Q. Do you remember what the amount of outstanding claims in favor of the estate was?

A. Well, I do not remember that; they did not exceed $600. They were little claims; I believe we have two little collections.

Q. Did you ever see any attorneys representing those claims that were owing to the estate?

A. Yes, there was quite a little amount of work of that kind; I saw various parties; I did not make a charge on the book.

Q. Did you collect any such claims?

162 A. We collected two claims; the amount is given on the books; they will about compensate some little amount; we expended $20.17 in and about the collection and there was $15.00 collected and $4.27.

Q. You have expended it out of your own pocket?

A. Out of the firm's pocket.

Q. How long have you been admitted to the bar?

A. Almost five years.

Q. In Chicago?

A. Yes, with Moses & Newman almost two years and then with Mr. Newman, and finally since March 1892, a member of the firm.

Q. Have you had any experience in assignment matters before this?

A. I have had considerable in my practice. I have had a great many assignments; I have been on one side or the other in assignment proceedings, thirty or forty of them.

Q. That is before this estate?

A. Yes.

Q. Are you familiar with what were the customary charges in Chicago for such work as you have done in connection with this estate?

A. Yes.

Q. What would be the customary charge for such work in Chicago?

A. I should think that $2,000 was a reasonable charge for our services and customary.

Q. What do you base that on?

A. I base it upon the amount of the property, the situation of the property, and all the work done; the complexity of the estate and the absence of the assignee and our responsibility by reason thereof and the numerous details and duties that devolved upon us by reason of his absence.

Q. Well, does the value of the property have something to do with it?

163 A. Well, it was stated to us that $72,000 had been invested; the property was worth anywhere from $25,000 to $30,000.

Cross-examination.

By Mr. OLDS:

Mr. OLDS: You base your value of $2,000 upon the estimate of the property finally at $72,000?

A. I did not say that; I said taking all of the things into consideration.

Q. You fix it upon the valuation of there being that much property involved?

A. I fix it upon just what I gave.

Q. Does the amount enter into it?

A. Oh, certainly, it always does.

Q. How many trips did you make to Waukegan?

A. As I said I cannot state positively but a great many—perhaps six or eight.

Q. In this matter how many times did you appear in Court there?

A. Well, in reference to the different petitions and orders perhaps six times or eight.

Q. Let me ask you if you did not first appear there at the time of the assignment?

A. Yes.

Q. I will ask you if the next time you appeared there was not on December 2nd, when there was an order to deliver certain property to the assignee filed?

A. No, I think I went before.

Q. To rent scows?

A. Oh, no.

Q. In order to make a contract?

A. I was there before.

Q. Isn't that the first paper on file from the time you filed the papers of assignment in this matter?

A. I filed three matters at one time up there.

Q. On one day?

A. I think so.

Q. Didn't you file all three of those matters at one time?

164 A. The papers may have been filed at one time.

Q. Well, wasn't that the only trip you made there and wasn't an order granted on the same day?

A. The three orders?

Q. Yes, all filed you at the time that you claim to have filed this petition in your general conversation—weren't these three matters now, all filed upon one day and all the orders granted by the Court on that day and you made but one trip up there?

A. When I went up there——

Q. Answer my question.

A. I will if you will alow me, if you want me to make an intelligent answer.

Q. I will ask you the question if you did not file the petition in the matter of delivering certain property to the assignee—the petition of the assignee to rent scows and for the order of making a contract—if they weren't filed and the order granted on the same day, on the second of December, 1892?

A. My recollection is not positive, I think so. That does not fully answer the question because I went up there and after preliminaries with the sheriff and lawyers and Court, we set the matters all down for Friday—now if that is on Friday, I suppose it is—that is the day

when we heard all these things; but I was up there before the same week Tuesday.

The COURT: On the same matter?

A. Yes.

Q. Before the formal petition was filed and before the order was entered?

A. Yes, then we set them all down.

Mr. OLDS: Who was with you?

A. I don't know but that Harry Gates was along with
165 reference to the labor claims; I don't think he was; he may have been along.

Q. I will ask you if you were there at any time from the time of that assignment—when you went up there the day that the assignment was made up until December 2nd, 1892, and if so when?

A. Ten days from November 22nd, I said I was up there before this at least once.

Q. What were you there for then?

A. With reference to the labor claims and the attachment that had been levied by the sheriff as I told you.

Q. Who was with you then?

A. I will state my best recollection; I can only state that I was up there all together six or eight times that I know, but what particular days I went up there I do not know.

Q. Did you go there alone at any time?

A. Oh, yes, alone.

Q. How many times did you go there that Gates was not with you?

A. I do not remember that; perhaps three or four times.

Q. Was there any proceedings taken in Court up until December 12th or December 2nd?

A. On account of any order?

Q. Yes, or any papers filed in Court after the assignment?

A. After the deed of assignment?

Q. After December 2nd?

A. I think not; the petition may have — filed before; I may have filed the petition before.

Q. Then on December 12th, you filed an inventory?

A. If it states that date—I do not recollect—yes.

Q. Now, who made out that inventory?

A. I stated I did.

166 Q. Was Gates present?

A. I think he assisted some in making out the inventory, one of the papers I know he did.

Q. Now, the list of the property was furnished you, wasn't it?

A. A list that had to be gone over.

Q. You don't mean to state that you as attorney went out and made an inventory of the property from the property itself.

A. No.

Q. You made then this inventory from the list of items of the property that had been furnished you and a list of the claims you had?

A. From the papers which I directed the assignee to bring me in addition to those which he had brought me and from interrogating and estimating and from acquiring other information—any information which I could get regarding the estate I prepared the inventory.

Q. That was all done while he was there—he went with you to Waukegan to file it, didn't he?

A. No, I don't think he did; he may have gone. He was not there all the time.

Q. That was on December 12th?

A. I remember dictating a certificate to the inventory two hours when Mr. Gates was not present to the stenographer, particularly when he was not there.

Q. Then on December 29th were you there again to file a petition regarding his interest or property?

A. Well, I think once Mr. Hall, an attorney in our office went up; that is the only time he went up, just to file the paper—whether it is this, this seems to be in his handwriting—I do not know; I don't think he procured any orders; he may have gone up to file a petition or serve a notice.

Q. You do not know then if you were there at time or not?

167 A. I am not positive about this particular day; there was somebody there for me if I did not go up one of the other attorneys in our office went.

Q. On March 15th I will ask you if you did not file the inventory and if Mr. Gates did not go up there with you?

A. I do not remember of Mr. Gates being along; I cannot recollect.

Q. You went up there when that was filed?

A. I tried from December 20th to about the middle of January to get Mr. Gates to come here and he would not come.

Q. And you were there when the inventory was filed, weren't you?

A. Yes.

Q. Wasn't Mr. Gates with you?

A. I do not recollect; he may have been and may not.

Q. I will ask you if those were not the last papers filed in the case prior to the 17th day of April, 1893?

A. The petition and order for sale, I think those were the last papers we filed.

Q. Those were the last papers filed?

A. I do not think we filed—I entrusted them to the clerk; I don't know what dates they put on them.

Q. As to the insurance, you spent a large amount of time hunting for insurance?

A. I said I spent time up at Waukegan and spent the next day here, together with one of the clerks, I think of an insurance office here.

Q. Now that was made on one of the occasions when Mr. Gates was with you?

A. Mr. Gates was with me at that time at Waukegan.

Q. Well, you were waiting there for a train to return when you

were up there on some business and you called on insurance men?

168 A. We did not take the 2:48 train; I told him I would not leave Waukegan until he had effected insurance or done our best.

Q. How long did you wait?

A. We waited from 2:48 until 5:30, which train we did take.

Q. That is the time you occupied for insurance?

A. At Waukegan, yes, it may be from 2 o'clock.

Q. And that is the only occasion you looked for insurance there?

A. Up at Waukegan; and there was one company there—the insurance company nearest the depot—he said he did not known but what he might place it and he said he would communicate with me or write me a letter. I telephoned him this Friday that followed the Monday or Tuesday I had left him—I telephoned him and he answered back that he had seen some of the local agents of insurance and he finally decided that he would not take any insurance.

Q. All you had to do—he communicated with you and did you answer it?

A. Yes sir.

Q. That was the sum of it?

A. Telephone to Waukegan and an answer.

Q. That was the time occupied for insurance?

A. Not in trying to get insurance.

Q. In insurance at Waukegan?

A. No, we went to other offices.

Q. Mr. Levison, you say you bid off the property up there—you say that you made an offer there to make a sale of the property for—the assignee?

The COURT: He said he bought it.

Q. These parties that purchased at the pretended sale that you claim, were procured to make the purchase by you weren't they?

A. No, sir.

Q. They were not purchasers at your instance?

169 Mr. NEWMAN: I induced these people to come up there to bid.

Q. You were making every effort to have that property sell for the purpose of putting money into the assignee's hands, weren't you?

Mr. LEVISON: The assignee, as I said, under the order of the Court, was making a sale for that purpose.

Q. You were endeavoring to have that property sell there so as to put money into the hands of the assignee, weren't you?

A. I think we were endeavoring to sell it for the grounds stated in the petition that you have there. The Judge clearly stated that he thought the property ought to be sold.

Q. I asked you in regard to your efforts?

The COURT: He said he went up there to try and get that property sold.

Mr. OLDS:

Q. You had no interest in the matter so far as you were concerned in taking care of Mr. Gates?

A. I told Harry Gates up there in the conversation which we had after the sale, when he took hold of my arm and pretended to be very friendly and he said there was no need of carrying on the warfare any more—I told him he made an outrageous statement at the sale, which was impudent and unwarranted; and I stated to him then I said "You know very well that you are responsible to us for fees, when if it comes down to the question of fees, we do not have to look to anybody else." I said that to him walking away from the Court House in Waukegan on the evening of Tuesday, April 18, 1893.

Q. Now, you had a conversation in the presence of Mr. Catterson prior to that time as you obtained an order for sale?

A. Yes, to Mr. Catterson.

170 Q. Didn't you say to him then—he inquired if this property would not sell for enough to pay expenses—how are we going to get out expenses and fees for services—didn't you say to him that you had proposed to attend to having a purchaser so that the property would sell for enough?

A. Did I say what?

Q. Did you say that?

A. No, sir; the nearest approach to that was what I told him at Waukegan on the morning of the 18th of April. He came to me there with the fear that the property would not bring enough to pay his expenses, eight or nine hundred dollars; and I said to him "If you give me $25 I will guarantee that it will bring enough for your expenses. That was in the hotel at Waukegan. He kept fearing that his expenses—fearing that the property would not bring anything.

Q. These claims that you have spoken about collecting a few dollars in money—wasn't it understood all the time that those claims were worthless and that there was no effort made to collect them?

A. I did not so understand it; but Mr. Gates spoke about bringing a suit against some of them; we collected two.

Q. They were regarded as worthless?

A. No. They were notes, but still I had no ground of knowing what they were worth, but a few of them were collected.

Q. Notices that you prepared and Mr. Gates signed was a notice from Indianapolis?

A. All he did was to mail them; everything else was prepared here.

Q. Did you prepare all of them?

A. Yes, they were all prepared when we came back from Waukegan; I stayed down late; it was about 7 or 8 o'clock before

171 I got away from the office preparing these notices; I had them written off on the typewriter—that is my recollection of it. I gave him particular instructions about it and I think I gave him written instructions, but I am not positive about it.

Q. This time you went to Indianapolis you say you went down there visiting some of your friends?

A. Yes, as I said; I told Mr. Newman before I left and was talking with him about it; and I made no charge for expenses on that Indianapolis trip—none whatever.

GEORGE W. NORTHRUP, one of the plaintiffs, being called as a witness and duly sworn, was examined in chief by Mr. Judd and testified as follows:

Q. What is your name?
A. George W. Northrup.
Q. What is your occupation?
A. Attorney of the Chicago Bar.
Q. One of the plaintiffs in this case?
A. Yes.
Q. Acquainted with the defendant A. B. Gates?
A. I know Harry B. Gates; I don't know as I know Mr. Gates, I have met him.
Q. When did you become acquainted with them?
A. The first time I recollect seeing these gentlemen was the morning referred to by Mr. Newman, some time last winter when I came down to the office about nine o'clock and Mr. Harry B. Gates and Mr. Gates was there, and I think another gentleman, perhaps two. I did not have much interest in the transaction. They presented this letter from Morris, Newberger and Curtis in reference to the Corporation with the idea that some action was necessary and we set to work to draw up some assignment papers when Mr. Newman
172 stepped into the office—I think Mr. Newman stepped in.
Q. State fully what occurred?
A. And we went into Mr. Newman's private office and Mr. Harry B. Gates was there. The letter was talked over and the question of the assignment of this American Mortar Co. was discussed: there was considerable conversation; I understood there that Mr. A. B. Gates was largely interested in this concern as a creditor and otherwise; that it was in a dangerous condition; there were impending attachments and there were mortgages and he said that action must be taken at once and he supposed that this matter called for an assignment as being desirable. And the substance of that matter was that Mr. A. B. Gates and Mr. Harry B. Gates desired our firm to represent them in this matter. In view of the condition of the company Mr. Newman advised an assignment after the talk. The discussion was then about who should be the assignee and the name of Mr. Harry B. Gates was proposed. Mr. Newman raised the question that he was not a resident and that he was the sone of a party largely interested and that it was very unadvisable to appoint him as assignee on account of the suspicion of the *bona fides* of the transaction. However, inasmuch as the assignment was to be made perfectly *bona fide*, he did not wish anything done that would cause any suspicion in any way. However, Harry B. Gates was the most positive that he wanted to be assignee. My impression was that he wanted to make something out of the assignment as assignee and therefore he did not want to lose the job and insisted upon being made assignee. And thereupon the deed of assignment was drawn up in Mr. Newman's office; my recollection is it was in his own handwriting. The names were changed so as to fit the corporation, the deed was drawn up and signed, and then my impression is
173 that Mr. Levison went up to Waukegan with these parties or one of them, to have the assignment duly recorded and filed

in Court and get immediate possession. My impression is that there was some question over the telephone in the day about some attachments. My recollection is I advised Mr. Levison to file the assignment as quick as he could possibly do so.

Q. After that date did you have anything personally to do with the detail management of that assignment?

A. Not with drawing the papers or the detail management; my room on the side of the office is next to Mr. Levison's and there were many men in there and the doors were frequently open and he frequently consulted me about various questions that arose; I remember various questions about leasing those scows coming up and I remember that he seemed to be spending a large portion of his time on this estate.

Q. During what period of time?

A. From the time he went to Waukegan to the time of that sale and I remember the time of the sale last spring. He seemed to be absorbed in that estate; there were a great many people coming in frequently in the office, creditors and laborers, and people connected with the scows and tugs and wanted to see somebody about it and I would refer them to Mr. Levison to find out what they wanted.

Q. Who had special charge of that estate?

A. He did, Mr. Levison; I understood that Mr. Newman was looking—supervising it. He did supervise a great many things because we talked it over, but my recollection about the work is not very distinct.

Q. During these months how much of Mr. Levison's time was spent so far as your information goes in this estate?

A. I could not say but I know he was continually engaged
174 at it. Every once in a while he would be drawing up some paper and doing something with that estate, so I could not get him to pay attention to other matters; he seemed to be very largely spending his time on the American Mortar Company. I know I frequently wished the estate was out of the office and I told him so once or twice.

Q. You have heard the testimony of Mr. Levison of what detail work he has done in this matter to-day?

A. I have.

Q. You have heard Mr. Newman's testimony of what he has done?

A. I have.

Q. How long have you been practicing law in Chicago?

A. About ten years; not consecutively—I was out about two years.

Q. You are familiar with assignment practice?

A. I have been in this county and practicing that time; yes, I am quite familiar with assignments.

Q. You are familiar with charges in matters of this kind in Chicago?

A. I have had considerable experience in the county Court here as to the allowance of assignee's fees as to what are customary and fair charges allowed here by the Courts.

The COURT: You are familiar?

A. Yes.

Mr. JUDD: What would be the customary and legal compensation rendered in this matter?

A. My opinion is about $2,000.

Cross-examination waives.

175 Mr. HARRY B. GATES, being called as a witness in his own behalf and duly sworn was examined by Mr. Olds and testified as follows:

Q. You are the assignee of the American Mortar Company?

A. I am the assignee of the American Mortar Company.

Q. How did you come to be in Chicago—you were at the office at the time spoken of?

A. At the time the assignment was made I was in the office.

Q. How did you come to be there?

A. My father was a stockholder in the American Mortar Company and I represented a brother-in-law who was a stockholder.

Q. Who was he?

A. Mr. Hewitt Howland also present in the office at the time the assignment was made. When the company decided to make this assignment, the day before we came up here about 6 o'clock, my father came to me and requested me——

Objected to. Objection sustained.

Q. I will ask you this question as to whether you came on the request of anybody interested?

A. I did.

Q. When did you get here?

A. We got in about 8 o'clock in the morning; we immediately got breakfast, my father and myself. Mr. Howland had come up here the day before and Mr. E. Woolen had come up the day before. We got breakfast and went to their office about 9 o'clock in the morning.

Q. Who went with you?

A. Mr. A. B. Gates, myself, Mr. Howland, Mr. Condit and Mr. Woolen. Mr. Northrup came in a few minutes after we were there. Mr. Levison came in and I think there was a gentleman but I won't say—who it was but I think it was Mr. Howland; we had an introduction to him and Mr. Northrup and Mr. Levison.

176 Q. Had you any interest in that company whatever?

A. I never had a dollar's interest in it in my life except what they owed me individually.

Q. For services as assignee?

A. For services as assignee and money that I invested in paying off laborers.

Q. You may state what occurred at the office?

A. When we came there there was Mr. Levison and Mr. Newman present—or Northrup was the only one that was present; Mr. Levison came in a few minutes afterwards and Mr. Northrup too, and read from the letter of introduction and took us into a room to the right which I afterwards found to be Mr. Newman's private office and he

got out a law book showing how assignments were made and commenced to draw it up from that and had about completed it when Mr. Newman came in and he commenced to object to the way it was done and said he wanted it done another way. I suppose the whole time occupied 15 minutes. We had a paper drawn up. "Now, Mr. Gates" he said "you own that property just as much as if you had paid for it; now, you go with Mr. Levison up to Waukegan and take possession of it." We never had any conversation at all as regards who should hire him or never did; never opened our mouths about that.

Q. Who presented this letter?

A. Mr. A. B. Gates gave it to him; I had nothing to say to him during the time excepting to be in there.

Q. You went there about nine o'clock?

A. About nine o'clock; it was a few minutes before.

Q. What time did you leave for Waukegan?

A. We left for Waukegan at 11:30.

Q. You came from Indianapolis?

A. I did.

Q. And left for Waukegan about what time?

177 A. 11:30. Mr. Levison, Mr. A. B. Gates and myself.

Q. You went to take the papers and file them.

A. Yes.

Q. Did you take possession of the property?

A. I took possession; Mr. Levison left at 11:30 and my father took me over and introduced me to the employes of the company and I took possession. My father left on the night train for Chicago for Indianapolis; he did not stay long—not over two or three days. I came down the next day to their office and reported to them the state of affairs; that the workmen were there in possession and that they wouldn't give possession until their salaries were paid which Mr. Levison said they had a right to. So he prepared an order and sent it up there and the following week I came up. I went home either the second or third night and came back the following Monday or Tuesday, and he and I went up together to Waukegan and we got this order from the Judge authorizing me to pay these employes on the tug and authorizing me to get a watchman to watch the plant and I paid them up that day.

Q. Did you see him draw the order?

A. Yes.

Q. Or the petition that he filed there?

A. I could have had my stenographer do it in about five minutes.

Q. Where was it done?

A. Newman's office.

Q. How often were you there?

A. Of course he came out there himself.

Q. You went to Waukegan and the petition was filed and the order granted on the same day?

A. I went up on the 11:30 train and got there at 12:20, and we ate dinner together at the hotel, I think.

Q. Now, at this point, did you leave with him a list of the property?

178 A. No, not at that time, no, sir.

Q. Did you obtain it?

A. I had a list furnished me by the book-keeper of the people they owed and the people that owed them and the number and the property. That was all made out by the book-keeper.

Q. When did you have that made out?

A. I kept that with me all the time when we made the inventory I came up from Indianapolis and went to his office and with my assistance or with his assistance I compiled the inventory.

Q. Now, that list you always had, too, in your possession?

A. Yes, sir.

Q. State to the Court whether the inventory was made out from that?

A. Yes, all that was added to that was the technical form of law.

Q. From the time of filing that inventory when did you go up there?

A. I generally got around there every morning when I came to town.

Q. You were around all the time the inventory was drawn?

A. No, except *all* the time they called in this stenographer who made a mistake in it; it had to be drawn over for which this stenographer rendered me a bill.

Q. What was the time occupied in drawing that inventory?

A. I should judge from a half hour to an hour steady work; a man could do it in a half hour.

Mr. LEVISON: And the stenographer was occupied in doing it?

A. Yes, sir.

Q. Did you go up there when that was filed?

A. I did. I paid Mr. Levison's fare and bought him his dinner on the dining room car.

179 Q. The occasion he went along with you?

A. Yes.

Q. How many trips were made by Mr. Levison?

A. Mr. Levison made three trips up to the time of the sale and one trip was made by Mr. Howland.

Q. How do you know?

A. Because I went with him; because he told me when he had a bonds-man. Of course he has gone out other times. He has gone without direction from me.

The COURT: He did not have that direction?

A. I thought he would if he needed it.

Mr. OLDS: Did he ever go up at any time?

A. I think he told me he went up about some attaching creditors.

Q. Now, this question of insurance; was any search made for it?

A. We got done with our other business with the Court in about a couple of hours and Mr. Levison never was out to the plant and we had intended to go out and look at the plant.

The COURT: When was that?

A. That was when we were out with some files. Something came

up about insurance; I told him that we could not insure from there. I am responsible on the bond and I went to Mr. Weiss, the cashier of the First National Bank and we went down in the town and they declined to write and we went to another insurance man and both times the same.

Q. Was any arrangement for insurance accomplished?

A. No, it was very plain we could not insure.

Q. Was anything said to you as to any further effort for insurance?

A. No.

Q. Have you any knowledge as to any services being rendered looking to insurance by them?

A. I know he wrote me afterwards that he tried to get in-
180 surance down here but could not get it; I would not be positive about that.

Q. I want to ask you about this bond?

A. Why, they had a professional bondsman there that they said they would get for me for twenty-three hundred dollars; I said it was too much and I satisfied the American Surety Company of Indianapolis on the strength of that bond they gave me bond to this Court after which I paid them $125.

Q. On the strength of the American Surety Bond?

Objected to.

Q. Now, what arrangement was made—who employed those parties?

Objected to.

Q. What was said about employment?

A. Nothing was said.

The COURT: What was said upon the subject of the employment of these men?

Mr. OLDS: You may state everything that was said on that subject.

A. There was nothing said whatever. Mr. A. B. Gates simply handed the letter to Mr. Northrup and when Mr. Newman came in he handed it back to Mr. Newman for him to read and Mr. Levison read it. There wasn't anything said by himself or by A. B. Gates or by any one else present and never a thought or a word of conversation at that time with them at that time until I got in the office.

Q. Now, what conversation did you have with them at any time about fees?

A. I think there was never anything said to me about fees until the time we went to Waukegan. Of course I had some when I first took hold of the plant. I thought the thing was more valuable. I knew there had been lots of money paid in there but I had
181 never seen the plant; I supposed from what money it had cost it was very valuable and I represented to these men it was very valuable. $72,000 had been spent there but after I got into it and commenced to look around for bidders, it commenced to get small; you could not get anybody that would bid $10,000 for it at a private

sale and then I had paid out considerable money, in the neighborhood of $600.00 and I then asked Mr. Levison several times how I was to get my money out of this: He never gave me a direct answer. Mr. Levison, myself and George Catterson went up together. I then asked him the question and he always seemed to avoid answering it, because he didn't know or because he did not want to tell me I could not tell; and when we got down to the situation in case this property would not sell for enough to pay my expenses and fees if my claim would be a lien on the property he says "You need not be afraid; I will have bidders about here; you may rest assured on that score." And then another time was on the morning of the sale; "Mr. Gates" he says "There is going to be some startling developments here to-day;" I says "What do you mean by that?" "I don't know;" he says. I turned to him but he did not explain. I says "how about my fees or expenses?" He says "if you will give me $25 I will guarantee there will be enough bidders there to cover your fees." It was about half past 12; he seemed to be very anxious waiting for somebody and watching down the hill to the railway station.

Q. Up to that time had there been any change in your relations?

A. Not until I specially remember the day of the sale; I was waiting for some creditor to go out to manage the sale. Mr. Levison and Newman and myself had negotiated to see the mortgage company.

182 He had been writing on some man to return and finally I got tired waiting for him and I went in then to Mr. Newman with a statement. The claims were $39,000, and then we went and arranged the matter and then came up the subject regarding this we had arranged on this other matter.

The COURT: What was said about fees?

A. There was a little conversation before that. When I came in his office Mr. Newman said "How are you, Mr. Two Hundred Dollar Man?" And I says "How are you, Mr. Two Thousand Dollar Man?" That was all that was said about fees and Mr. Newman says to me, "Now, Gates, how about fees?" And I says "Mr. Newman, I have nothing to do with your fees whatever; I cannot make myself personally responsible to you for them, but anything the Court will allow I will not contest;" Then when I came back to the office he says "Is Condit going to buy in this property?" And I says "Mr. Condit has bought my father's mortgage;" he says, "have him secure me my fees before the sale takes place;" I says "I have nothing to do with Mr. Condit." I went over and saw Mr. Condit and he said he would have nothing to do about fees. I came away and reported to him about it; he said I should go again. I went over there and waited an hour or two but he did not come back in time. I saw Mr. Levison up at the sale; he says "Why didn't you wait until morning?" I says "We wanted to meet you and I went up there about 9 o'clock.

Q. Was there a conversation there in Whitney and Patton's office at the same time?

A. There was after that man had bid it in and they had put up their money; he says "Are they good for our fees?" Mr. Newman said that to Mr. Whitney.

Q. What was done?
183 A. We went down and turned the property over to them.
Q. Who was in possession?
Mr. NEWMAN: Haven't you said that Mr. Condit was in possession under his mortgage?
A. The man never told us nothing; I started to go into the door and he pushed me back; he put his hand back for a minute.
Mr. OLDS: You found other parties in possession?
A. Yes, they told me so.
Q. Do you know who took possession?
A. I afterward found out that Mr. Condit had it.
Q. Then what occurred?
A. Then Mr. Newman got in there and got the Judge to set aside the sale after I had the money for it.
Q. Now, the day of the sale, what was the amount of the bids there?
A. It was struck off to a party unknown to me—people that came up there and that Mr. Levison seemed to be glad to see when they came up from the depot; they took it for $5175.
Q. Who?
A. Mr. Haney was the bidder; he bid $5150; then he struck it off. These other people—when I saw the back of the check I declined to accept anything but $500 deposit and I stepped over and asked Mr. Whitney what I should do about it; he says "Don't make any sale unless they have $500:" which I did.
Q. How did you come to go to Whitney?
A. They had retained him for me or for themselves, I don't know which.
Q. Then the property was offered again?
A. Yes.
Q. What other parties bid?
A. I think it was Mr. Gaffney and Mr. Haney—it was some man Gaffnet or Haney; it was $2113.14; and Mr. Levison then
184 runs down to the telephone and requests me not to sell the property until he came back. I had been holding it for $2120. He came running back as soon as he could and said he would take the property; then Mr. Gaffney or Mr. Haney declined to bid against him. He said they had no right to bid on the property, he was my attorney.
Q. Was that said there?
A. That was said there openly. When I turned the property over to him they have given their checks there.
Q. Had you any arrangement made there?
A. Not a bidder.
Q. How much have you got out of the estate?
A. Not a dollar; I think I got $75 on the rent of the kiln and they owed me $80 and some accounts in the neighborhood I think of $300.
Q. What became of it?
A. I applied it on what they owed me.
Q. For what?

A. I paid the tug men $300 and paid for a watchman one or two weeks.

Q. Was that your individual money?

A. That was my individual money?

Q. Have you got any part of it?

A. I have not received a dollar as yet.

Q. This property is turned back to other parties?

A. Turned back to the stockholders I guess or somebody; I know my lawyer wrote me that there had been a petition to set aside the assignment.

Q. You don't understand the legal form?

A. No.

Q. You made a final report?

A. I don't know as there was a final report.

Q. You made a report?

A. At the time we made a request for sale we made report;
185 some creditors were in the office about it.

Q. Who furnished the data?

A. I did; and Mr. Levison drew it off in legal form to his stenographer and I paid $2.50 for doing it or $3.50.

Q. Was any effort made with reference to the collection placed in their hands?

A. None that I know of; I wrote them to bring suit on them but they failed to do it as far as I know of.

Cross-examination.

By Mr. JUDD:

Q. What is your business?

A. I am in the wholesale business; grocers' sundries.

Q. With whom?

A. With my father and my brother.

Q. Is it a partnership or corporation?

A. It is a partnership.

Q. What is the name of the firm?

A. A. B. Gates & Co.

Q. How long have you been in that business?

A. I have been in the business for 17 years.

Q. With your father?

A. Yes, sir.

Q. And your brother?

A. Yes.

Q. I mean with the firm as it now is?

A. It has been that way 24 years.

Q. You came up here with your father November 21?

A. I left Indianapolis on November 21st at night.

Q. You went with him the next morning to Newman & Northrup's office?

A. Yes.

Q. How much money did you pay out on this estate—the estate owed you at the time of this assignment—they owed you an even thousand dollars?

A. Yes.

Q. Did I understand you to say that you had no interest in this subject matter?

A. What is that?

186 Q. You said that when you went to Newman & Northrup's office you had no interest in it?

A. No interest whatever.

Q. Did you come here to be assignee?

A. Yes, sir.

Q. You understood you were to be made an assignee?

A. Yes, sir.

Q. Didn't you want to be an assignee?

A. Yes.

Q. What did you want to be an assignee for?

A. Because I would not take advantage of anybody.

Q. You did not have any desire to protect your father?

A. Not any more than I did any other man; not any more than I did any other creditor.

Q. But your father was the biggest creditor?

A. He was.

Q. Weren't you interested?

A. Yes, sir.

Q. In what way—did you pay out this money that you spent yourself, without consulting your father?

A. Yes, why should I consult with my father?

Q. I want to know the fact?

A. I did not consult him.

Q. Does he know you have paid it?

A. I presume he does; he saw me make checks and he has known it.

Q. Was it a firm check?

A. It was the firm checks.

Q. You paid out money of your father?

A. I paid out money that belonged to me.

Q. Was it charged to you on your book?

A. It was charged to me.

187 HORACE K. TENNEY, called and sworn as a witness on behalf of the plaintiffs, was examined in chief by Mr. Judd and testified as follows:

Q. What is your name?

A. Horace K. Tenney.

Q. What is your occupation?

A. Attorney-at-law.

Q. Where do you practice?

A. Here in Chicago.

Q. What is your firm?

A. Tenney, Church & Coffeen.

Q. How long have you been practicing in Chicago, Mr. Tenney?

A. Something over twelve years.

Q. Have you had familiarity with the branch or practice of the law with reference to assignments for the benefit of creditors?

A. Yes, sir, quite extensively.

Q. Are you familiar with what are the customary and usual charges that are made by lawyers practicing in Cook County in such matters?

A. I think I am.

Q. I will ask you hypothetically, Mr. Tenney, the following question: Assuming that the American Mortar Company is a corporation organized under the laws of the State of Indiana with substantially all its business and property located at or near Waukegan in the state of Illinois and that its assets amount to between the sum of $25,000 and $50,000; that it has become greatly embarrassed; that the business in which it is engaged is the business of manufacturing mortar and like products with its principal factory and plant located at Waukegan and a tug and several -and scows used for the transportation of sand and mortar from Waukegan to Chicago on Lake Michigan; also a large number of outstanding accounts and claims; that attachment suits against the property of the corporation were threatened and about to be brought by creditors and one attachmen suit in fact had been brought and a part of the com-

188 pany's property levied on and that for the purpose of preventing the dissipation of the Company's assets and protecting its creditors it became necessary for the Company to take some active and immediate steps in that behalf and that for that purpose some of the officers and agents of the company called upon and retained the firm of Newman & Northrup, Attorneys at law, Chicago, Illinois, for the purpose of having said corporation make a general assignment under the laws of the state of Illinois and placing its property in the control of an assignee; that the said Newman & Northrup were instructed and did prepare a Deed of Assignment and all other necessary papers which were executed by the said corporation making Harry B. Gates, Assignee, and that all the steps required by law were complied with in the execution, delivery and recording of said deed of assignment;

That a member of the firm of Newman & Northrup accompanied the Assignee to Waukegan and perfected the assignment by recording the Deed in the Recorder's office of Lake County, Illinois, and filing the same in the County Court of Lake County and assisted the assignee in taking immediate possession of the property located at or near Waukegan in said Lake county;

Assuming also that it was necessary for the attorneys in said matter to proceed to prepare a Petition, and they did prepare such petition for the Assignee for leave to pay certain claims to laborers who had actual possession of the tug and refused to deliver possession of the same unless their claims were paid, and that considerable time was consumed in ascertaining the amount and correctness of these claims and putting them in such shape that the Assignee could properly pay them; the total claims amounting to about Three Hundred Dollars;

189 Assuming also that said attorneys prepared a petition praying for a rule on the Sheriff of Lake County to show cause why he should not be attached for his attempt to levy on property

in possession of the Assignee, and that the said Attorneys served notices and copies of said Petition upon the Sheriff of Lake County, and had these matters set down for hearing by the Court; that the said Attorneys afterwards attended on the hearing of the petition for a rule on the sheriff and also concerning the labor claims and after arguments, consultations and agreements with the various attorneys at Waukegan drafted and had entered several orders whereby leave was given to the assignee to pay the said labor claims and the Sheriff turned over the property levied on to the Assignee;

Assuming also that the said attorneys had consultations with the Assignee and prepared receipts and satisfactions of the liens for various labor claims above spoken of; that the said attorneys had further interviews with the Assignee regarding the bond required of him and also concerning the settlement of various outstanding claims in favor of the estate, which claims amounted to about $1,000;

Assuming also that said attorneys after consultations with the Assignee drafted and filed a petition on behalf of the assignee asking for permission to lease the tug and scows belonging to the estate, and that the said attorneys obtained, prepared and had entered an order allowing the assignee to lease said tug and scows;

Assuming also that the said attorneys drafted a contract for the lease of said tug and scows, which lease provided for a rental of $150.00 per week to the Assignee for the benefit of the estate and that the said Attorneys also prepared a special bond from
190 the lessees of the tug and scows to the assignee in order to protect the Assignee from any liability for loss or injury or failure to return of said tug and scows;

Assuming also that the said attorneys prepared as requierd by the statute, the Assignee's inventory of the assets and liabilities of the said estate which said inventory was voluminous and detailed and required at least four days in the preparation thereof and also that the said attorneys prepared the report of the Assignee accompanying said inventory in reference to the condition of said estate;

Assuming also that said Attorneys devoted considerable time to the procuring by the Assignee of a bond, as required by the statute, such bond being difficult to procure for the reason that the Assignee was a non-resident of Illinois and that these services included numerous interviews with the officers of the American Surety Company and making arrangements with them for the re-indemnity and also procuring such bond and having the same filed and approved in the Lake County Court.

Assuming also that the said attorneys spent considerable time both at Waukegan and Chicago in their efforts to place insurance upon the property of said estate in the name of the Assignee, and that they were unable to procure the same by reason of the fact that the Insurance Companies refused to insure a factory not in operation, and was in the hands of an assignee, and assuming also that the said attorneys prepared and filed a petition showing to the Lake County Court that the Assignee and his attorneys were unable to procure any insurance on the property of said estate and that the

said attorneys obtained an order of said Court directing the
191 Assignee to employ a watchman of said property as reasonable and sufficient care of the same;

Assuming also that the said Attorneys prepared and caused to be mailed notices to the creditors of said estate, as required by the statute of Illinois, and that said Attorneys drafted and filed numerous objections to executions and claims filed against said estate;

Assuming also that one of said attorneys spent one-half day in the city of Indianapolis with the assignee and others interested in said estate in consultation with the assignee and other parties with reference to the adjustment and settlement of various matters in said estate, and a possible settlement by the parties in interest with all the creditors; that the affairs of this estate were greatly complicated by reason of the fact that chattel mortgages had been filed against the property assets of said estate, that several liens were claimed against the tug and that two attachment suits were pending against the property of the said estate so that the Assignee and parties in interest thought it desirable to make efforts to settle with the creditors of the estate and wind up the assignment proceedings that numerous interviews were had at Chicago with the assignee and some of the officers of the American Mortar Company with reference to said settlement;

Assuming also that one of the scows belonging to the estate was lost and that a claim for salvage was made by the finder thereof for $500, which claim was afterwards reduced to $200; that said Attorneys in connection therewith had several interviews with the party claiming the salvage and with his attorney and finally procured the return of the scow without the payment of any salvage;

192 Assuming also that a petition was filed in said Assignment proceedings for a lien on the tug under an act for attachment on water craft under the laws of Illinois for about $1300 and that the said Attorneys drafted and filed a demurrer to said petition and had several interviews with the Assignee and with the attorneys for the claimant with relation thereto;

Assuming also that the said attorneys prepared and entered report for the Assignee as required by the statute showing the condition of the assets and liabilities of said estate, the names and residence of creditors to whom notices had been mailed and the certificate of publication, showing the publication at Waukegan, Illinois, of notice to all creditors together with a list of all the claims against said estate filed with the Assignee and the names of all the parties claiming to be creditors of said estate and that the said Attorneys filed said report in said Court;

Assuming also that said Attorneys drafted a Petition on behalf of the Assignee setting forth the complicated condition of the estate and the fact that the estate was being depleted by the necessary expense of administration and setting forth the necessity of immediately selling all the assets of said estate, and that such Petition was filed in said proceedings and an order drafted and obtained and entered providing for the sale of said assets; that the said attorneys in accordance with said order of sale caused publication notices to

be made at Waukegan, Illinois, and other advertisement of such sale as required and suggested by the Court.

Assuming also that during the performance of all the above mentioned services said Attorneys were required to go to Waukegan Illinois, from time to time for the purpose of filing papers
193 and procuring the entry of orders and for appearing before and making arguments before the County Judge of Waukegan, all of which were necessary to the proper and orderly administration and discharge of the duties of said Assignee.

Assuming also that the period of time of the above mentioned services down to and including the obtaining of the order of sale and publication and advertisement thereof was from November 22, 1892, to about April 1, 1893, that the attorneys all of said time, with the exception of perhaps six days, said Assignee was engaged in business in the city of Indianapolis in the State of Indiana and resided and remained there and that in consequence thereof said Attorneys had to take charge of all the details of said estate and were constantly interviewed by various laborers and other claimants of said estate and by various Attorneys representing parties in interest in said estate and that the said Attorneys had frequent correspondence with the Assignee and other parties in interest relative to the affairs of said estate and the conduct and management thereof;

Assuming then that such services as have been above described were rendered by the firm of Newman & Northrup, Attorneys, located and practicing in the city of Chicago, what in your opinion as a lawyer and what from your knowledge and experience of and in such litigation and such services in the City of Chicago would be a customary and reasonable compensation for such services?

A. Fifteen hundred to two thousand dollars.

194 Cross-examination.

By Mr. OLDS:

Q. Mr. Tenney, modifying their question in the respect: The parties coming up here to make an assignment of property consisting of this character, going to the office of these parties about 9 o'clock, the consultation lasting only until—and the papers were drafted and one of the parties started with them—the parties one of the stockholders and the assignee at 11:30 o'clock of the same day go- — Waukegan; that the filing of this petition and drawing of them that has been mentioned, consisted of the drafting of them and going to Waukegan and filing and obtaining orders and returning, not exceeding a half a dozen trips. That the inventory that was spoken of took two, three or four days of the attorney's time; the data was copied and furnished by the assignee and submitted to the attorney, not taking to exceed three or four hours' time; that the correspondence with the assignee, who resided at Indianapolis would not cover over 15 or 25 letters of from one to four pages each; that the property involved did not exceed the value of from ten to twenty thousand dollars; that the order for obtaining the sale was subject to mortgages and claims of the mortgagees, and upon final sale sold

for but $2,900 or $3,000, and that the sale was set aside by reason of the mortgagees' obtaining the property and the termination of the proceedings in the assignment by petition from the creditors, so that nothing was realized from the estate. What, under those circumstances if the trip to Indianapolis was not made for the purpose of seeing the assignee but was a visit there—one of the firm had a conversation when he was on a visit to Indianapolis. With these modifications of the facts stated in the question, what would
195 you say the reasonable value of the services would be?

Objected to; objection overruled; exception by plaintiffs.

A. I should think it might make a difference of perhaps $500.

LEVI MAYER a witness for the plaintiffs being called and duly sworn, was examined in chief by Mr. Judd and testified as follows:

Q. What is your name?
A. Levi Mayer.

Mr. JUDD: May it please the Court, I wanted to save time and instead of asking that long question I have submitted that question to the witness.

Q. What is your occupation?
A. I am a lawyer.
Q. Where do you practice?
A. In Chicago.
Q. What is your firm?
A. Moran, Kraus & Mayer.
Q. Mr. Mayer, how long have you been practicing in Cook County?
A. Well, I was admitted in 1877 and altogether in active practice since 1881.
Q. You have been in practice here actively for 12 years
A. Yes, and a little practice between '77 and '81.
Q. Are you familiar, Mr. Mayer, with that portion of the practice of the law in regard to assignments for the benefit of creditors?
A. Somewhat.
Q. You have had some experience in that?
A. Yes.
Q. Do you know what are the customary and usual charges made by lawyers for services rendered in such matters?
A. Yes.
Q. Have you read the hypothetical question that I furnished you a copy of?
A. I will say I have read the paper I have in my hand.
196 Q. And just the same one I propounded to Mr. Tenney? Did you hear me read it at the time?
A. I only heard you read a few questions. I did not hear the whole of it; I took this into the Judge's Chamber and read it.
Q. Mr. Mayer, it is the same question; assuming the services to be such as stated to have been rendered by the lawyers—such as stated in the hypothetical question—what in your opinion would

be the customary charge for such services by practicing lawyers in Cook County?

A. Before answering that question I would like to inquire what was the value of the assets of the estate?

Q. You may assume that the assets represented an investment on the part of those who had invested in this corporation of over $70,000 and that the actual value of the assets at the time of the failure would be not less than about $30,000 and not more than $50,000.

A. Now, let me ask what were the total liabilities of the estate?

Q. Assuming that the total liabilities were about $21,000.

A. Now, let me ask what became of the estate?

Q. Further, you may assume, Mr. Mayer, that the estate was never administered in the County Court but that after a sale of the assets had been made, it was set aside by consent of the creditors and the estate was withdrawn from the County Court.

The COURT: And the services of the plaintiffs ceased on the day of the sale.

A. And that the services continued from November '92 to April '93?

Mr. JUDD: Yes.

A. Was there a retainer paid in the case?

Q. Assuming that there was none paid whatever, nothing
197 paid at any time.

A. I consider a reasonable fee for those services included in this hypothetical question and your answers to my questions from $1,500 to $2000.

Cross-examination.

By Mr. OLDS:

Q. Did you hear my modifications put to Mr. Tenney?

A. I did not; I heard you put some question but I did not hear it.

Q. Well, assuming that the estate at the time was in fact worth from ten to twenty thousand dollars and that it was mortgaged to the amount of—that it was closed out and sold by the mortgagees, their claims amounting to nine or ten thousand dollars.

A. I did not hear that.

Q. That the mortgagees—that the party purchased the mortgages for nine or ten thousand dollars and took possession of the property under them and that the sale was obtained by the assignee subject to the liens and afterwards the property was taken possession of by the mortgagees the sale having been made for $2,900 or $3,000.

A. The sale made by whom?

Q. The sale made by the assignee.

A. Subject to the mortgage?

Q. Subject to the mortgages to the attorneys Newman & Northrup, who had been representing the assignee.

A. That they also represented the mortgagees?

Q. No sir, I don't know what they did; it was bid in by Levison one of the firm who had represented the assignee, for $2,900 or $3,000; the mortgagees got possession of it and the sale was set aside,

so that the assignee received nothing out of the estate by reason of any sale of the property and there only came into his hands three or four or five hundred dollars as assignee, and that the
198 inventory which was spoken of took three days to prepare, through data which was furnished by the assignee, and only took two or three hours by the attorney to draw it; and the report spoken of in the same way, the data was furnished by the assignee and only took four or five hours at the outside to draw it and that this petition was incorporated in there, including the drawing and going to Waukegan by a member of the firm, not exceeding a half a dozen trips to obtain the proper orders and always returned on the same day; that the time with reference to the insurance occurred upon one of these occasions at Waukegan when he was obtaining an order and visited the insurance office in connection with the assignee; that the trip to Indianapolis was not made on account of this business but because one of the firm was there on a visit to some friends there, and held a conversation with the assignee in relation to the business; that the bond that is spoken of was prepared for the indemnification of the guarantee company and was drawn by the guarantee company and furnished—the attorneys Newman and Northrup simply answering the question with reference to the responsibility of the party or both of them. With that modification of the question, what would you say the services were reasonably chargeable against the assignee in the case?

A. My answer was based upon the hypothetical question; if the facts embraced in the hypothesis are not facts, my answer does not apply. If the facts are as you put them. Did any assets come into the hands of the assignee at all?

Q. Four or five hundred dollars and not exceeding that.

A. And at whose instance?

199 Q. He took possession of the property and it was taken from him and he received four or five hundred dollars.

A. At whose instance was the purchase made by one of the attorneys—whose benefit?

Q. The attorney on his own solicitation or on his own motion; not on behalf of the assignee.

A. Did he purchase it for himself?

Q. For himself, yes.

Mr. NEWMAN: There was no purchase; there was just simply a bid.

Mr. OLDS: The sale was confirmed and set aside; it was reported to the Court and it was finally set aside.

Mr. MAYER: What was the total amount realized by the assignee in the estate?

Q. It was discontinued; the mortgagees took possession.

The COURT: By the agreement of the parties under the statute of creditors.

Mr. MAYER: Why, with the modification that you have put, assuming those to be correct, my answer would be considerably modified. I would say that a thousand dollars would be a reasonable and

low charge for these services, in charge for these services, in fact a low charge.

Mr. OLDS: In view of the result of the case and the amount involved as against the assignee, it would be a pretty strong charge against him.

A. No, in my answer I am not considering who the defendant in the case is; I am basing my case upon the value of these services no matter to whom rendered; with the modification that you put I consider a thousand dollars a reasonable charge for those services including retainer.

200 E. M. ASHCRAFT a witness for the plaintiffs being duly sworn, was examined in chief by Mr. Judd and testified as follows:

Q. What is your name?
A. E. M. Ashcraft.
Q. What is your business?
A. Lawyer.
Q. What is your firm name?
A. Ashcraft & Gordon.
Q. How long have you been practicing law in Illinois?
A. Over 20 years.
Q. How long in the city of Chicago?
A. Over six years.
Q. Have you had considerable experience in Cook County in assignments for the benefit of creditors?
A. Yes.
Q. Are you familiar, Mr. Ashcraft, with the customary and usual charge made by lawyers for all kinds of business in the county of Cook, that is, outside of criminal business?
A. Yes, I don't know about charges in criminal business or divorce business.
Q. Are you familiar with the customary charges that are made in matters of assignment for the benefit of creditors?
A. Yes, sir, I believe I am.
Q. Mr. Ashcraft, did you read the hypothetical question that I put to Mr. Tenney here?
A. Yes.
Q. Did you pay attention to it at that time?
A. I did.
Q. Mr. Ashcraft, assuming those facts to be true which are assumed in the question what in your opinion would be the value and customary and usual charge made by a practicing lawyer in Cook County for such services as are described in the question?
A. $1500 to $1800.

201 Cross-examination.

By Mr. OLDS:

Q. Did you hear my modification?
A. Yes, sir, to Mr. Mayer.

Q. Would you be kind enough to state your opinion upon that modification?

A. Assuming the case as you modify it in your interrogatories to Mr. Mayer, together with the statements you made to his questions, I think from $800 to $1000.

And thereupon the plaintiffs rested and the defendants to further maintain the issues on their part introduced the following evidence.

HOMER COOK a witness for the defendants being duly sworn was examined in chief by Mr. Olds as follows:

Q. What is your name?

A. Homer Cook.

Q. You are a member of the firm of Cook and Upton?

A. Yes.

Q. How long have you been practicing law here?

A. Oh, some thirty years. I was attorney for the mortgagees.

Q. I will ask you what connection you had with reference to the case?

A. I was attorney for some of the mortgagees in the case.

Q. Do you know the extent and amount of the estate?

A. Yes, somewhat.

Q. What was the amount of the estate actually?

A. After the proceedings were dismissed the company sold the assets; I engineered that arrangement and from the knowledge I obtained then the assets were considered to be worth I think about $18,000.

Q. About $18,000?

202 A. Yes, but encumbered for nearly that value.

Q. Was that on the second sale—on the sale by the assignee of the mortgagees?

A. No, on the sale by the company after it was taken out of Court.

The COURT: After the proceedings were dismissed?

Mr. JUDD: Are you telling then what it realized after it was taken out of court?

The COURT: Yes.

Mr. JUDD: I object to that and ask that it be stricken out.

Objection withdrawn.

Mr. OLDS: Were you familiar with what was done in this matter of assignment proceedings, the steps taken?

A. Well, personally I know to a considerable extent what was done and have seen files and have seen something of the records in Waukegan and I practiced there some in this case.

Q. You practiced in Waukegan? Could you state what steps were taken in the case and what was done?

A. Well, the proceedings to start with were no different from any other case of a like nature; the assignment was filed there and the schedule of the assets and of the debts—I had occasion to examine them. We were called into the case by some parties who held chattel mortgages and we sought to have the lien of those mortgages estab-

lished and get permission to sell and in doing that we learned who the other lien creditors were; there were others—one or two others.

Q. You filed a petition for them?

A. We filed a petition and gave the assignee notice and assignee's attorneys who I think at that time were these plaintiffs.

203 Q. Was there any appearance at that time by them?

A. I think they filed a demurrer, to our petition; the assignee's attorneys were changed during the time.

Q. But up to the time of the sale what else was done?

A. Well, we obtained on one of our petitions leave of court to foreclose the chattel mortgage.

Q. Was there an appearance by the assignee's attorneys prior to that or at any time—Messrs. Newman & Northrup or their firm?

A. Yes.

Q. How long did the matter of demurrer and of the services—how long a time was occupied by them in reference to that in Court?

A. I do not remember the amount at all.

Q. There was a demurrer filed?

A. I would not be positive that the assignee filed a demurrer; it may have been a lien creditor *you* claimed a lien for a coal bill.

Q. In the matter of obtaining the lien was there an appearance of this firm of Newman & Northrup for the assignee in that matter?

A. Yes, sir.

Q. How long a time did that occupy?

A. No personal appearance.

Q. No personal appearance?

A. No, we got a rule *nisi* and then had it made absolute and order entered.

Q. Do you know anything about an order being made to release the tug and pay for——

A. That was subsequent.

Q. That was subsequent?

A. After we filed this petition that I have been testifying about, we filed another with reference to a chattel mortgage and

204 obtained a rule *nisi* and in that matter the assigne was represented by some Waukegan attorneys. That was before this sale; I was not present at the assignee's sale, but I was present when a contest was had over confirming the sale but I remember of its confirmation.

Q. That was after the sale?

A. After the sale.

Q. Now, you know the amount of the liabilities, debts and assets, do you not?

A. Well, in a general way.

Q. Well, I will ask you Mr. Cook, to state upon the testimony as given as to what was one in that case as to what *was* the reasonable and customary services in that case would be worth?

Objected to.

A. I don't know what particular work may have been done by the attorneys for the assignee; necessary papers were filed or dictated, but judging from what I do know, which is what I learned from the

files and from my connection with the case, I would say that the plaintiffs had rendered services to the assignee that were worth $500.

Q. Now, assuming, Mr. Cook, that the services in the preliminary matters—that when they came up here, the President of the Company, Mr. A. B. Gates and one or two of the other parties or stockholders came up and Mr. Gates went to the office with his son, who was appointed the assignee, in the morning about nine o'clock and talked the matter over, and the papers were drafted for the assignment and the assignment made and Mr. Levison went with Mr. Gates down to Waukegan on the same day and at 11:30 the papers had all been completed prior to that and returned on the same day; and following that he obtained a petition for sale and procured that
205 order, directed and gave the necessary notice, prepared the form and instructed the assignee to give the notice to the different creditors; and that he obtained these other orders and had conversations with parties or answered inquiries about claims, that would ordinarily arise in such a case. What would you say if that was the state of facts that existed here, as to the question of services, and whether it would be any larger than you have spoken of?

A. They would not; your last question would not include any more than ordinary services, that I put into the matter as necessary. That is, do I understand that they went to Indianapolis?

Q. The Indianapolis trip—my statement was that they went there on a visit, one member of the firm, and while there had some conversation with them. Notices were prepared and given to Mr. Gates who sent them out himself.

A. Well, if there were any services necessarily rendered it was out of the state.

Q. No, there was not; his services were all here—that is the attorney that directed and the assignee lived in Indianapolis and the mail all came to him.

A. Well, I would not change the estimate from $500.

Cross-examination.

By Mr. JUDD:

Q. Mr. Cook, you live at Waukegan, do you not?

A. Yes.

Q. How long have you lived there?

A. 36 years.

Q. Have you practiced law there nearly all that time?

A. No, sir, I have been practicing here mainly, but incidentally there.

Q. You have had an office there always together with the one in Chicago?

206 A. No, sir, I have not kept an office there but a portion of the time. I live very near the Court House; the only office I have is my residence.

Q. Is there an assignment for the benefit of creditors often made in Lake County?

A. Not very often.

Q. That is a curious proceeding, is it in Lake County?

A. Well, we have had several there contested. One of the few cases under the new law started there.

Mr. COOK: Who did this property sell to after these proceedings were discontinued?

A. Well, I cannot name the purchaser now, he was a stranger to me.

Q. How much did you say it was sold for?

A. I think $18,000. My recollection is that it was $18,000.

Q. Was the name Hussey?

A. Yes.

Q. Warren Hussey?

A. Yes, that is the name.

Q. Do you know a man by the name of Condit?

A. Yes.

Q. Did he have any connection with that sale through Hussey that you know of?

A. Well, he negotiated it; John M. Condit, I think is his name. I say he negotiated it; he took an active part in having it consummated.

I say negotiated it; he took an active part in having it consummated.

Q. Who did you represent in the matter of that sale?

A. The purchaser.

Q. The purchaser Hussey?

A. Yes.

Q. Is he related to Condit in any way that you know of?

A. I do not know how that was.

Q. You represented the mortgage at the time of the assignment, did you?

A. Yes.

Q. Who took the property imediately after the discontinuance of these proceedings?

207 A. Who took possession of it?

Q. Yes, who was the mortgage holder that you represented during the assignment and took possession immediately after the suit was discontinued—the assignment matter?

A. I don't know as there was any change of possession immediately after the suit was discontinued; I am not aware there was any change of possession.

Q. Who was in possession of it?

A. The mortgagee.

Q. What was the name?

A. Mr. Gates was the original mortgagee; there were three or four mortgages given to different parties.

Q. The mortgagee in possession was Gates, was it, A. B. Gates?

A. Mr. Gates had sold the mortgage, I think to Mr. Condit.

Q. He was Mr. Condit, the purchaser of the mortgage from Mr. Gates?

A. Yes.

Q. And you had represented him during the assignment proceedings—how did you come to represent the purchaser Hussey in the sale after this and not Mr. Condit?

A. Well, we represented first Mr. Gates; I think he was related to the assignee.

Q. Which Gates was it?

A. I think it was the father of the assignee, that is Gates was the mortgagee and assignee, father and son, but I do not know now which was which.

Q. Well, it was the son that was the assignee and you represented the father?

A. Yes, then, the father.

Q. And then you represented Condit?

A. Yes.

Q. And when these proceedings were discontinued he was in possession then as mortgagee?

A. That is the way I understood it.

Q. When did you cease to represent Condit and come to
208 represent Hussey as the purchaser?

A. Well, I don't know as there is any particular period—after the creditors had consented to the dismissal of the proceedings. We had done it under my direction and advice partially. That is, questions arose with regard to the foreclosure of these mortgages and I advised an adjustment between the holders of the mortgages and the company and to get a purchase of the property, and the arrangement was brought about.

Q. Mr. Cook, after the discontinuance of this assignment proceeding, there was a sale, you say, by Mr. Condit of this property to Hussey for $18,000?

A. No, you do not understand me, a sale from the company to Hussey.

Q. For $18,000.

A. I think that was $18,500, perhaps.

Q. Was that including the lien upon the scow?

A. No, including the lien, I think; the amount bid above the lien was a very small amount.

Q. Do you remember what the amount was?

A. No.

The COURT: Assuming a certain sum the liens were to be paid?

A. Yes.

Q. Were to be taken from the property or proceeds?

A. Yes, the property; they remained on the property and the purchaser had to take care of them.

Q. And then that was sold to Hussey?

A. Yes.

Q. And then he paid the mortgage—he had to take care of the mortgage?

A. He had to take care of them; what has been done since, I do not know.

Q. And the mortgage amounted to something in the neighborhood of the amount of this sale?

A. Yes, within two or three thousand dollars.

209 Mr. JUDD: Who introduced you to Mr. Hussey?

A. I never had an introduction to him.

Q. Who employed you for him?
A. Mr. Condit.
Q. Now, Mr. Cook, wasn't Mr. John M. Condit and Mr. Hussey one and the same party and it was taken for Mr. Condit, and that this was a paper sale without any consideration.
A. (No answer).
Q. As far as you know, isn't that it?
A. I haven't any such knowledge.
Q. You say — represented at one time Mr. Condit and then Mr. Hussey?
A. I did not say Mr. Condit; he never owned the property.
Q. I mean the American Mortar Company?
A. Yes.
Q. You represented Mr. Condit, the mortgagee?
A. Yes.
Q. You had purchased the mortgages from Mr. Gates?
A. He purchased one mortgage from Gates and another mortgage from some other party.
Q. He was the holder of mortgages which were first liens and you represented him?
A. Yes.
Q. Who employed you—you represented Hussey the purchaser and purchased this think for Hussey without having seen Hussey and all your transactions were with Hussey, were they not?
A. Yes, sir, I saw one of the directors of the company.
Q. Which one?
A. I know Mr. Woolen.
Q. His interests were adverse to Hussey and Condit's—the company's interest?
A. Perhaps; I did not directly represent Hussey; I will explain how it was; after the matter was taken out of Court, then
210 there were these mortgages against the property and I represented the owners of these mortgages and the question arose as to whether we should foreclose on these mortgages and I advised Mr. Condit that he could make an arrangement of the matter with the directors of the company and I made out some papers and I think I made out a deed and part of the property was released; it was a release bill, a bill of sale—made it out or dictated it, so really I did not cease to represent the mortgagees or the owner of the mortgages and as Mr. Condit was the owner at lease the holder and owner, I had my consultations with him, and I advised that course instead of a foreclosure and that was carried out. Personally I had nothing to do with it although I prepared the papers.
Q. Then at the request of Mr. Condit you prepared a bill of sale to some man named Hussey whom you had never seen?
A. I do not know that the bill of sale ran to Hussey.
Q. You do not remember who was the purchaser?
A. I afterwards understood that it was Hussey but I think when I prepared it the name was blank; I am not certain about that.
Q. Whom did you represent at the time these proceedings were discontinued?

A. The creditors and I suppose the mortgagee.

Q. Did you not represent the American Mortar Company, the insolvent?

A. (No answer).

Q. Did you not represent the insolvent at that time also?

A. Perhaps so.

Q. Who retained you in that case to represent the company, the American Mortar Company?

A. It seems to me that Mr. Woolen spoke to me.

Q. Whom did you have dealings with first—A. B. Gates or Woolen?

211 A. Well, with Mr. Gates, the mortgagee.

HARRY GATES being recalled testified as follows:

Mr. OLDS: I believe I did ask you about the conversation that occurred the day after the sale up there?

A. I think I answered that question.

Q. I want to revert to the question in reference to the time you entered the office there; who opened the conversation when you and your father went there—what was said?

A. I never said a word during the whole—from the time the papers were drawn up and they asked who they wanted made assignee and they said Harry Gates.

Q. What did your father say?

A. Well, father simply came in and asked if that was the office of Newman & Northrup and gave a letter of introduction to Mr. Northrup.

Q. What if anything did you ever tell him you wanted generally?

A. They simply said we wanted to make an assignment of the American Mortar Company.

Q. Then the matter of fact that was being talked about was the assignment?

A. It was all simply talked over whether the assignment should be made, not any other question.

Q. I want to ask you a question. I want to ask you to state now what the facts are as to whether you ever employed or discharged this firm?

Objected to.

The COURT: I think that Mr. Gates has stated all that was said.

Mr. OLDS: I submit that this question is competent; it is competent to ask the witness the direct question.

The COURT: As to what particular time?

212 Mr. OLDS: As to any time.

The COURT: As to whether he discharged him at the time?

Mr. OLDS: I desire to put the particular question as to whether he ever employed him at any time or discharged him.

Mr. JUDD: That is the question we are trying in this case but not on the opinion of this witness.

Mr. OLDS: I desire to put the question.

Objected to. Objection sustained.

213 2 P. M., THURSDAY, *July* 13, 1893.

H. B. GATES being recalled to the stand was examined by Mr. Olds and further testified as follows:

Q. Mr. Gates, the day after the sale did you have a conversation again with reference to a discharge—upon the subject of having a discharge of this firm?

A. Yes, sir.

Q. With Mr. Levison?

A. The day after the sale Mr. Levison came by appointment to Waukegan to meet me regarding turning the property and paying the balance of the money, having a confirmation of the sale from the Judge; and we did meet up in Whitney & Upton's law office. Mr. Levison and I had had a little disagreement the day before and we were not on very pleasant terms.

Q. Well, never mind that.

A. Anyhow he brought up the subject and he says "Gates, do I understand that you have discharged us as your attorneys? I said "Most positively not, Mr. Levison; I have not discharged you."

Q. Who was present at that conversation?

A. Mr. Whitney of the law firm of Whitney & Upton, Mr. Upton of the same firm, Mr. James Condit, Mr. Hussey and myself.

WILLIAM D. O'BRIEN a witness for the defendant being called and duly sworn, was examined in chief by Mr. Olds, and testified as follows:

Q. You may state your name?

A. William D. O'Brien.

Q. Where do you reside?

A. 3546 State street.

Q. Do you remember the sale of the Mortar Works Company had at Waukegan.

214 A. Yes.

Q. Were you present at that time?

A. Yes.

Q. Whom did you represent at that time?

A. No person in particular except myself.

Q. Were you engaged with the firm at that time?

A. No, I was not engaged with the firm; I went down to see that place.

Q. Did you bid upon it?

A. My friend did.

Q. For you?

A. Equally interested.

Q. Who bid for you?

A. Mr. Gatley.

Objected to as irrelevant.

Q. What was the amount.

A. Well, he bid in the neighborhood of $1,500; somewhere in that neighborhood.

Q. Then was there a second sale—another sale?

A. Birwin and Howard bid higher and it was knocked down to them and they gave a check for $200 and they were still to give $200 and pay the balance the next day and the property was to be turned over to them and then the assignee stated there the amount of money involved in the bid was to be cash, and they could not get any money in the mean time as they were strangers in Waukegan and the assignee declared the sale over and ordered a new sale or at least put it up again at auction, so when he done so, Mr. Hussey, the partner of Mr. Condit, as I understand, bid upon it and so did Mr. Gatley; they ran it up to $2,600. In the mean time Mr. Levison said it was outrageous to sacrifice the creditors' property and objected to seeing it and he was going to see if he could not communicate with Mr. Newman in Chicago and see about making arrangements for getting the money for these parties; in the meantime the bid was up to $2600 and he run it up to $2,900 and I advised my man not to bid any more on it and it was knocked down to Mr. Levison.

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Q. Did you make any tender there?

A. Why should I make a tender when we were not the highest?

The COURT: The property was not knocked down?

A. Knocked down to Birwin and Howard and they made a tender and tendered a hundred dollars currency they claimed they had.

Mr. OLDS: But I understand that the attorney of the assignee had the tender refused?

A. They were willing to give $200.

Q. When did you make this contract with Newman and Northrup?

A. They afterwards came in on the train and I got acquainted with Levison. I said to him "Do you want to sell your deal, if you can get a higher price for it?" He said "Yes." I said "I will give you more than you bid for it if you can turn the property over to me." So we went up to his office and there we made an arrangement if the Court confirmed the sale, and the property became transferred, they should sell it.

Q. You paid over a thousand dollars?

A. Yes, we paid over a thousand dollars and took $500 of it and left $500 in escrow.

JOHN M. CONDIT, a witness for the defendants being called and duly sworn, was examined in chief by Mr. Olds and testified as follows:

Q. Where is your business?

A. I live at Waukegan.

Q. You became at one time the owner of this property that has been in controversy here, this mortgage company?

A. I became the owner of the mortgages, that is I bought the mortgages.

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Q. Did you ever become the owner of the property and purchase it or make a sale of it?

A. No, sir, not myself.

Q. Were you the person who, the day after the sale heard a conversation between Mr. Levison and Mr. Gates as to the employment?

A. Yes, I was in Upton's office the day after the sale when Mr. Levison and Mr. Gates was there.

Q. You may state what was said there about employment.

A. That is about the employment or discharge?

Q. Yes.

A. The only thing I remember, Mr. Levison was walking up and down the floor while Mr. Whitney was writing some sort of a conveyance and Mr. Levison said "Well I suppose, Mr. Gates, we may consider ourselves discharged as the assignee's attorneys?" Mr. Gates says "No, I think not; I think you have abandoned the assignee."

Q. Do you know the amount that was tendered there on the first bid that day.

A. Well, I believe they said that the amount they would pay was $200 but I think they said they only had $75 in cash.

Q. Mr. Condit, you have negotiated in connection with the sale there as to the value of that property?

A. I think I know the value of the property as well as anybody does.

Q. At the time it was involved in that litigation—at the time that assignment was made, you may state to the Court what the value of the whole mortar works property was worth.

Objected to. Objection overruled.

A. When the assignment was made?

Q. Yes, at that time.

A. Well, it developed shortly after the assignment was
217 made that the railroad company would not transfer the lease so that the buildings and all the machinery were on leasehold ground and this lease was not good that they would not consider any transfer of it; so it became a question in my mind very shortly whether the property would bring enough to pay the face of the mortgages, which was about thirteen or fourteen thousand dollars. I did not think it would.

Q. What in your judgment was the fair market value or fair worth of that property?

A. I do not think it was worth over $10,000 and possibly $9,000.

Cross-examination.

By Mr. JUDD:

Q. Mr. Condit, you were an officer of the American Mortar Co.?

A. No, sir.

Q. Were you an employé?

A. I was manager.

Q. You were manager at the time of the failure?

A. Yes.

Q. How long had you been?

A. Two years, ever since it was organized.
Q. Were you a stockholder?
A. Yes.
Q. How much stock did you have in it?
A. About $7000.
Q. What was the total capital stock?
A. The total capital stock of the company was $75,000.
Q. And you had about 1/10?
A. Well, it was not all paid in; there was only about $50,000 paid.
Q. About $50,000 of the capital stock paid in?
A. Yes.
Q. Had you paid all of yours?
A. I had paid all of my own all that was sold was put in the business.
218 Q. How much was the total mortgage on the property?
A. The total mortgage on the property was about $13,000 with interest.
Q. You bid $2500 at the sale?
A. I did not bid at all my partner bid $2500.
Q. So your firm bid for it?
A. We had arranged he should bid.
Q. How much were the liens and mortgages on the property?
A. Well, there was a judgment of about $450 and charges about $500 and there were bills against the tug of sixteen or seventeen hundred dollars; I guess that is all the liens there were.
Q. And if this property was only worth $10,000 how did your firm come to bid $20,000 subject to these liens?
A. I had already bought the mortgages for a great deal less than their face.
Q. From whom?
A. Mr. Gates.
Q. A. B. Gates?
A. A. B. Gates.
Q. How long before the sale was it that you bought the mortgages?
A. Two or three days before the sale.
Q. You had seen the officers of the railroad company hadn't you, about that leasehold before you bought the mortgages?
A. I did not know whether I could get one out of them.
Q. You knew that you could get an assignment of that lease if you foreclosed those mortgages, did you not?
A. No, sir.
Q. When you bought them?
A. No, sir.
Q. When you bought them?
A. No, sir.
Q. Did you buy those mortgages without knowing whether you could get the leasehold or not?
A. When I bought the mortgages I knew I could get the leasehold.
219 Q. You knew you could?
A. Yes.

Q. You had seen the railroad company?

A. I had; the president, general manager, superintendent and traffic manager.

Q. That leasehold—I ask you if it was with a rebate?

A. There was a privilege rebate there which I secured the building including which we had there; that is the American Mortar Company and I made a contract with the Joliet & Eastern Railroad to take out a certain amount of sand over it.

Q. Is that the lease and all there was belonging to it?

A. That lease was a twenty-five year lease of five acres or more of land.

Q. It gave you the privilege of taking out sand on that?

A. No, sir, not out of that five acres.

Q. They did not?

A. No, I will tell you just about the lease if you want to know.

Q. Well, you had the lease arranged for before you bought?

A. No, sir.

Q. Took possession, didn't you before the sale?

A. No, sir.

Q. How long after the sale did you take possession?

A. I took possession eight days after the sale.

Q. Whose advice were you acting under at the time?

A. I was acting under my own advice.

Q. No lawyer?

A. I did not have any advice when I took possession.

Q. Isn't it a fact that you went there as a chattel mortgagee and took possession of the property?

A. I took possession of the property immediately after the sale was confirmed.

220 Q. Was anybody in actual possession at the time you went there?

A. Yes.

Q. Who was it?

A. The custodian of the assignee.

Q. You found him there, did you?

A. I requested him to give me the keys that I wanted to take possession of the property under my mortgage?

Q. Did he do so?

A. He did so; I did not force him but I insisted upon it and he did it.

Q. You say that you were present at the sale?

A. Yes.

Q. You say there was a tender made there?

A. Yes.

Q. Who made that tender?

A. Tender? I do not know.

Q. You say there was a tender of only $75—who made it?

A. I do not know about any tender; all I know is about these two fellows who were there bidding, and all I know is what I understand. I understand that they offered to pay $200, but I heard finally they only had $75.

Q. That is something you have heard?

A. I heard they offered to telephone back to Mr. Newman.
Q. You did not hear anything of a tender taking place there at the sale?
A. No, sir.
Mr. Olds: Mr. Condit, you live at Waukegan yet?
A. Yes, sir.
Q. Who is in possession of that property now?
A. Mr. Hussey is the owner of the property but I am interested in it with him running it—in the profits.
Q. You have got an interest in the profits running it?
A. Yes.
Q. But not in the ownership of the property?
221 A. No, sir.
Q. Do you hold any of the mortgages now?
A. No, the mortgages were paid with Mr. Hussey's money when they were bought.

George M. Catterson, a witness for the defendant being duly sworn was examined in chief by Mr. Olds and testified as follows:

Q. What is your name?
A. George M. Catterson.
Q. Where do you reside?
A. Indianapolis.
Q. What is your business?
A. Real estate agent.
Q. Were you up here with Mr. Gates at one time and at Waukegan?
A. Yes, sir.
Q. Were you in Mr. Newman's office?
A. Yes.
Q. Do you remember what was being done there—did you hear the parties say what they were going to Waukegan for?
A. Yes.
Q. Do you know what they went to Waukegan for at that time?
A. Yes.
Q. What was it?
A. To get an order to sell the American Mortar Company.
Q. Was it the time the order of sale was made?
A. Yes.
Q. In that trip did you hear any conversation with reference to the sale of the property for the purpose of having sufficient to pay the fees—the counsel fees and so forth?
A. Yes.
Q. What was said about that?
A. It was done at the Union Depot here at the station and we were waiting for the train; I had a lame ankle and was suffering a great deal from it and walked around a great deal—I was not able to stand very long at a time—and Mr. Gates and Mr. Levison
222 were carrying on a conversation. I know Mr. Levison very well and — Mr. Gates also I am pretty well acquainted, and I happened to come up.

Q. You have known them both for years?

A. I have known them both for fifteen years; and when I got up I says "What is the trouble? What is the matter now?" in a joking way. And Mr. Gates says "Mr. Levison, how are we going to get money enough to pay attorneys and pay the assignee?" And they seemed to be in doubt as to whether the plant would sell for enough to pay them and it seems they were after the money; and, Mr. Levison says "That is all right; we can fix that." Or words to that effect—I do not remember the exact words.

The COURT: What time with reference to the sale?

A. I do not remember the date; it was when they got the order.

Mr. LEVISON: Five weeks before the sale.

The WITNESS: It was the day the order was entered; I asked Mr. Levison how he could get a bidder in good faith who would go down in his pocket and pay off this balance against the estate if the estate was not worth that money: and he says "There is no trouble about that; we can fix that; this is not an Indianapolis bill, or Indianapolis, but Chicago." I intended to get to the balance of the subject but the train left.

CHARLES SHACKELFORD, a witness for the defendant, being called and duly sworn was examined by Mr. Olds and testified as follows:

Q. What is your business?

A. I am a lawyer.

Q. How long have you practiced in the city of Chicago?

A. I have been practicing law about twenty-five years; in
223 the neighborhood of five years in the city.

Q. Are you acquainted with the customary fees?

A. Yes, sir.

Q. In the City of Chicago in reference to various kinds of business?

A. Yes.

Q. In assignment matters and so forth?

A. Yes, some acquaintance with it.

Q. I will ask you if the American Mortar Company a corporation organized under the laws of Indiana, possessing property and assets at Waukegan consisting of some scows, tugs, engines and various classes of property of that kind, tools, pumps and so forth, and it is in embarrassed circumstances, a mortgage upon it to the amount of $15,000, the property ranging from ten to twenty thousand dollars in value, the stockholders to make an assignment and the President and some other stockholders come to the office of Newman and Northrup in the city of Chicago, in the morning about nine o'clock, and the President introducing himself says that he wants to make an assignment. The facts are talked over and the assignment made and completed in time for the parties to take the 11.30 train for Waukegan and that was done and Mr. Levison one of the members of the firm goes to Waukegan and files the paper and the assignment is made and possession taken of the property so far as could be at that time; afterwards, in regular course an inventory is made out, the data prepared by the bookkeeper and furnished by the assignee to the

firm and the inventory containing 11 pages of typewritten matter and covering assets and liabilities was made taking two or three hours' time. A petition is filed by the attorneys incurring a trip to Waukegan and back, a day's time, to make out and obtain an order for the sale and under their direction and necessary notices are given and published of the sale; a petition is filed for the
224 foreclosure of the lien, on the part of the lien holder and demurrers filed to them; parties are in possession of the tug claiming that they will not give it up unless their services are paid; a petition is filed for an order on the assignee to pay them and it is paid; a lease is drawn back to the assignee and a bond and the assignee when he comes to give a bond obtains a guarantee company to become his security; the attorneys, Newman and Northrup, answer some questions to the guarantee company in reference to him in securing the bond; a petition is filed and an order obtained to employ watchmen and all includes five or six trips to Waukegan and back, including in this time appearances in Court, in obtaining the orders and at one time while he was there the attorney goes with the assignee to consult with insurance companies or agents with reference to getting the insurance; the report of the assignee is filed covering ten pages; the necessary notice given of that. At the sale the property is offered for sale and bid off for $5,500 the sale not perfected and the property re-offered and sold then to the attorneys Newman & Northrup themselves and Levison one of the firm for $2900. In the meantime, the lien holders took possession of the property and that sale is set aside. A form of notice is prepared and furnished to the assignee to notify the creditors and debtors or to whom it may concern, involving the usual and necessary complications of an assignment involving that amount. With the various actions taken as I have stated, the matter was finally taken out of Court; the assignee received no assets. The property is taken possession of by a petition of the creditors under the statute and taken out of Court so that the assignee receives nothing except four or
225 five hundred dollars which he has paid out: what would you say the reasonable fees of the attorneys should be therein?

Objected to; Objection overruled.

A. The attorneys representing the assignee?

Q. Representing the assignee?

A. It would be a difficult matter to state that for the services of the entire firm; how many days was the firm or one of the firm away from the office?

Q. Not exceeding trips to Waukegan a half a dozen times.

A. I should think five or six hundred dollars would be a reasonable fee.

Cross-examination.

By Mr. JUDD:

Q. Mr. Shackelford, you are practicing here in Chicago now?

A. Yes.

Q. What is your firm?

A. I am alone.
Q. Do you make any specialties in any line of practice?
A. Well, not any specialties; I practiced down to Bloomington, Illinois, however a good many years; our lawyers have to become all around lawyers there.
Q. Since you have been here?
A. Since I have been in Chicago I have had more practice in the matter of assignments than in any other thing.
Q. You are by yourself now?
A. Yes.
Q. Have you been assignee in several estates in the County Court here?
A. Yes, I was assignee of the Wabash Manufacturing Company.
Q. Do you know how much attorneys' fees were paid in that case?
A. Yes.
Q. How much was it, $2,500 was it not?
A. Yes.
226 Q. How much were the assignee's fees?
A. $7,000.
Q. You may state how much assets came into your hands as assignee?
A. About $100,000.
Q. What proportion of the liabilities was that? How much was the dividend of the estate?
A. I think it was about 36 per cent. about that.
Q. How long were you occupied at the estate?
A. The fees were allowed by the Court.
Q. In the assignee's account were they not?
A. Yes.
Q. They were allowed by the Court?
A. Yes, and the attorney's fees—this Court allowed him his fees and I paid it to him; I think Wilde got more than that.
Q. He got about $3,500?
A. He got paid for services that had been rendered two years back.

And thereupon the defendants rested and the plaintiffs to further maintain the issues on their part, introduced the following evidence in rebuttal:

Mr. JUDD: I offer the letter written March 23rd, 1893: Harry B. Gates, Esq. care of A. B. Gates, Chicago, twenty days before the sale signed Newman & Northrup.

Q. (To Mr. Newman). Mr. Newman, is that your handwriting or that your signature to that letter?
A. I personally wrote this letter.
Q. You dictated it and then subscribed your name?
A. Yes, I sent it to Mr. Gates personally.

Letter of March 30th, 1893, offered in evidence.

Q. When did you see Mr. Gates after that letter was written?
A. A day or two before the sale.
227 Q. Was anything said about that letter at that time?
A. Yes, we discussed both letters fully.

Q. Both letters—the one you dictated and the answer?
A. Yes.

Objected to.

The WITNESS: The only thing I desire to state is I called Mr. Gates' attention to it long before there was any controversy or misunderstanding.

And thereupon the Plaintiffs rested and the Defendants to further maintain the issues on their part introduced the following testimony in rebuttal.

C. T. HEYDACKER a witness for the defendants being duly sworn was examined by Mr. Olds and testified as follows:

Q. What is your name?
A. C. D. Heydacker.
Q. What is your business?
A. I am State's Attorney for Lake county—attorney at law.
Q. How long have you practiced law?
A. I have practiced law since 1871—admitted in March 1871 and practiced there all the time.
Q. Practiced in assignments?
A. I have some and I have been in here occasionally and in the other counties but my practice is confined principally to Lake County.
Q. Had some business in connection with other matters here?
A. I have, yes.
Q. I will ask you whether or not you are acquainted with the general and customary fees of any legal business?
A. In Lake county?
Q. In Lake County.
A. I am.
228 Q. In Lake County in assignments and so forth?
A. Yes.
Q. And practiced to some extent here in the city?
A. Not very much in Chicago.
Q. Some knowledge as to that?
A. Some knowledge.
Q. How far are you out?
A. 35 miles.
Q. Have you knowledge of the assignment proceedings in the American Mortar Works Company at Waukegan?
A. I was attorney in that case; I was counsel for Mr. Kennedy; he represented some of the parties in this matter; Mr. Kennedy he used to be in my office; he represented some of the creditors and in that way I know something aboug the case as counsel.
Q. Did you have a general knowledge of what business was transacted or any part of it?
A. I have pretty generally because he submitted the whole proceedings at one time to me and I counseled as to what to do.
Q. Then you had general knowledge of what was being done by the assignee and his attorneys?

A. Yes, I was in Court with the assignee there when they were there in reference to the order with Mr. Kennedy when the agreement was to be made in regard to certain claims—certain orders were made.

Q. Had you knowledge of the property up there as to what it consisted of?

A. Why, I know generally it consisted of a franchise corporation, a franchise on leased property there, including some scows and I think some interest in some dock—tugs and property—owned some tugs—it was on leased property there a building there, a building that they had.

Q. Now, Mr. Heydacker, I wish to ask, assuming that these parties came up here, the President of the company and some
229 of the other directors probably and a son of the President of Mr. Gates and afterwards the assignee, and they went to the office of Messrs. Newman & Northrup about nine o'clock in the morning and Harry B. Gates informed them that they wanted to make an assignment of the company and immediately commenced consultation and prepared the papers and made the assignment.

A. Made the assignment and schedule?

Q. Yes. Up from nine o'clock in the morning—between that and 11:30, so that Mr. Levison and Harry Gates—the two Mr. Gates went to Waukegan on that 11:30 train.

A. On the same day?

Q. This assignment was simply made on that day; they filed it and Mr. Levison returned and they took possession of the property as far as could be that day and he returned to Chicago that day. Following that an inventory was made and the assignee and bookkeeper prepared a list and furnished the data to Mr. Levison and the inventory was prepared containing 11 pages of typewritten matter, taking at the outside two or three hours and that was filed and a petition filed for an order to pay off somebody that had possession of the tug.

A. Preferred creditors?

Q. To pay them off and release it; that order was obtained and this lease made back and an order against the sheriff for levying an attachment. At the time of giving the bond which was given by the guarantee company—made out the bond and it was furnished by Mr. Gates—it was an indemnifying bond; a petition for sale was filed and an order of sale was obtained, the necessary notices given and a notice for the assignee to send notifying the creditors; attending the sale, all in all including not exceeding five or six
230 trips to Waukegan; the property involved was not worth to exceed somewhere between ten and twenty thousand dollars; that that sale was finally set aside and the property taken possession of by them and the proceedings suspended by reason of a petition filed so that the assignee received no property excepting four or five hundred dollars; in that character of proceedings what would you say the services of the attorneys were reasonably worth?

A. It involved about six trips to Waukegan?

Q. About six trips not exceeding that.

A. I should say that a charge anywhere from two to five hundred dollars—probably two hundred dollars would have been the amount; I should have been glad to have done it for $200 myself.

Cross examination waived.

Which was all the testimony offered in said cause.

231 STATE OF ILLINOIS, *County of Cook, ss:*

Zeno T. Griffin being duly sworn says that the foregoing 122 pages is a correct transcript of his shorthand notes taken at the trial of said case.

ZENO T. GRIFFIN.

Subscribed and sworn to before me this 3rd day of May, 1894.

[SEAL.] C. T. B. GOODSPEED,
Notary Public in and for the County of Cook and State of Illinois."

Whereupon the hour of five o'clock having arrived, the Court adjourned until to-morrow, Tuesday, December 5, 1899, at nine o'clock A. M.

232 TUESDAY, *December* 5, 1899—9 o'clock a. m.

The Court met pursuant to adjournment.

Present the same as on yesterday.

The hearing of the evidence was resumed as follows:

Mr. GATES: This, may the Court please, is the certified copy of the proceedings in the Lake County Court, which had jurisdiction of the assignment proceedings, and it is now to be read in evidence for the purpose of showing that no order of Court was obtained either in advance of the employment of the attorneys Newman, Northrup & Levison, or after their employment, for their employment, or to reemburse said attorneys, or for any other purpose.

Mr. KETCHAM: May the Court please, we desire to object to the introduction of this evidence for the reason that it is irrelevant, and immaterial; that it tends to throw no light upon the issue offered by the 3rd paragraph of the answer which is the counter-claim; and for the further and additional reason that under the Constitution of the United States, it is not competent to attempt to controvert the force and effect of the judgment that was rendered in the Cook County Circuit Court by evidence, *aliunde;* that so far as the charge in the 3rd paragraph of the answer or counter claim is concerned, that there was a loss by reason of the by-bidding alleged, it appears affirmatively from the defendant's evidence that that matter was fully gone into in the hearing and trial at Chicago; and that so far as the averment of the answer is concerned that there was negligence or neglect of duty by the plaintiffs in the failure to obtain an order by the county Court to employ counsel, there was and is no requirement of law that such an order should be obtained; and
233 that the matter of damage, or alleged damage, growing out thereof, was necessarily concluded by the judgment the de-

fendant has already introduced in evidence; and the plaintiffs object for the further reason that until it shall be made to appear that there is some statute of the State of Illinois requiring such an order to be entered, the evidence upon that subject is entirely incompetent, irrelevant and immaterial.

The COURT: Do you expect to follow that up by proof showing that there is such a law?

Judge WALKER: Yes, sir.

The COURT: Then the objection is overruled.

To which ruling of the Court, the plaintiffs by counsel at the time excepted.

So the transcript of the proceedings before the Honorable Francis E. Clarke, Judge of the Lake County Court, in the State of Illinois, on Monday, the 7th day of November, 1892, was admitted and read in evidence, the same being in the words and figures following:

"UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said court within and for the said County began and held at the Court House, in the city of Waukegan in the
234 said county and State aforesaid, on Monday the seventh day of November in the year of our Lord, one thousand eight hundred and ninety two, (A. D. 1892.)

Present the Honorable Francis E. Clarke, Judge.

Attest: LEWIS C. DORSETT, *Clerk.*

Be it remembered that heretofore to-wit on the twenty-fifth day of November in the year of our Lord one thousand eight hundred and ninety-two the same being one of the days of said term of the said Court, the following among other proceedings were had."

Mr. KETCHAM: May the Court please, I want to make the further objection that this transcript does not purport or profess to be a transcript of all the proceedings had in the assignment, but only "of certain proceedings." The caption is "Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid, at the term of said Court within and for said County begun and held," etc., and "Be it remembered," etc., "the following amongst other proceedings were had in the matter of the estate of the American Mortar Company, insolvent: on the reading and filing of the petition of Harry B. Gates, assignee herein, it is ordered," etc. Now, it is apparent that there were other proceedings had prior to that time. It is apparent that there had been something done before this order was made; that there was at least a filing of a petition of some kind, and in the petition it was provided that he was authorized thereby to employ such help as may

be necessary in the care, conduct and management of said estate until the further order of the court. There is not anything here in this transcript to show what the paper was upon which that order was made, nor what had been done before that time. The
235 certificate is "I, Albert L. Hendee, Clerk," etc., "Proceedings in the matter of the estate of the American Mortar Company, insolvent as appears of record in Probate Order Book V, on page 141, etc., "In Testimony Whereof," etc.

In other words the transcript does not purport to be a transcript of all that was done in that case, but only a complete transcript of the particular proceedings which are copied there.

The Court overruled the objection, to which ruling the plaintiffs by counsel at the time excepted.

The reading in evidence of the Transcript was resumed by Mr. Gates as follows:

In the Matter of the Estate of THE AMERICAN MORTAR COMPANY, Insolvent.

On reading and filing the petition of Harry B. Gates, Assignee herein, it is ordered by the Court that said assignee may pay and he is hereby authorized to pay the sum of about three hundred dollars ($300.00) to tugmen and laborers on the tug "H. S. Sill" belonging to said estate; and he is further hereby authorized to employ such help as may be necessary in the care, conduct and management of said estate until the further order of this Court.

236 In the Matter of the Estate of THE AMERICAN MORTAR COMPANY, a Corporation.

Now comes Harry B. Gates, assignee of American Mortar Company Insolvent by Newman & Northrup his attorneys and presents his petition for a rule on the Sheriff of said County to show cause why he should not be attached for contempt, &c., and said sheriff in his own person and by Whitney & Upton his Attorneys also comes and Joseph Blaha by C. T. Heydacker and S. H. Kennedy his attorneys also comes and thereupon said petition coming on to be heard by agreement of said Assignee, said Sheriff and said Joseph Blaha and their respective attorneys it is ordered that the sheriff forthwith surrender to said Assignee the property levied on by him by Attachment writ issued out of Circuit Court of said Lake County at the suit of said Blaha against said Insolvent and said rule against said Sheriff be and the same is hereby discharged on compliance with this order.

And afterwards on the second day of December in the year of our Lord one thousand eight hundred and ninety-two, the same being one of the days of the said term of said Court the following among other proceedings were had.

STATE OF ILLINOIS, *County of Lake, ss:*

In the County Court of Lake County.

In the Matter of the Estate of THE AMERICAN MORTAR COMPANY, a Corporation, etc., Insolvent; HARRY B. GATES, Assignee.

Voluntary Assignment.

237 And now comes the Western Lime and Cement Company, a corporation, etc., of the city of Milwaukee, in the State of Wisconsin, by W. G. Rainey, its attorney, and Harry B. Gates, Assignee herein, by Newman & Northrup, his attorneys, and in open Court consent to the entry of the following order, in said Estate:

By agreement the Western Lime & Cement Company hereby turns over and delivers to Harry B. Gates, Assignee herein, eighteen Corey dump cars, being the property levied on by said the Western Lime & Cement Company, under a certain writ of attachment issued out of the Circuit Court of Lake County on the 17th day of November, A. D. 1892, and now in possession of the sheriff under said attachment, reserving, however, to said the Western Lime & Cement Company whatever rights, liens or claims, including costs, it may have under and by virtue of said writ of attachment as may be hereafter adjudicated and determined. This order in no wise adjudicates upon the rights of the parties, but is entered for the purposes of convenience and to avoid heavy costs. The rights of all parties shall be determined hereafter.

W. G. RAINEY,
Att'y for Western Lime & Cement Co.
NEWMAN & NORTHRUP,
Att'ys for said Assignee Harry B. Gates.

238 STATE OF ILLINOIS, *Lake County:*

In the County Court of Lake County.

In the Matter of the Estate of THE AMERICAN MORTAR COMPANY, Insolvent; HARRY B. GATES, Assignee.

Voluntary Assignment.

On reading and filing the petition of Harry B. Gates, Assignee herein, it is ordered by the Court that said Harry B. Gates, Assignee of said Estate, may make, and he is hereby authorized to make a contract or lease with James M. Condit, leasing to said James M. Condit two scows, one tug and one sand pumping outfit, upon the following terms; said Condit shall pay to said Assignee the sum of Fifty dollars per week for the use of said property, and shall further give a bond in the sum of Twelve Thousand Five Hundred Dollars, with two good and sufficient sureties, for the safe use and return of

said property to said assignee upon the termination of said contract or lease. That said contract or lease may be terminated by said Condit, or by said assignee upon either giving to the other party one week's notice of such termination or by mutual consent.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said Court within and for the said county began and held at the Court House in the City of Waukegan, in the said County and State aforesaid on Monday, the fifth day of
239 December in the year of our Lord one thousand eight hundred and ninety-two (A. D. 1892).

Present the Honorable Francis E. Clarke, Judge.

Attest: LEWIS C. DORSETT, *Clerk.*

Be it remembered that heretofore to-wit on the twenty-ninth day of December in the year of our Lord one thousand eight hundred and ninety two the same being one of the days of the said term of the said Court the following among other proceedings were had.

STATE OF ILLINOIS, *Lake County, ss:*

In the County Court of Lake County.

In the Matter of the Estate of THE AMERICAN MORTAR COMPANY, Insolvent.

Voluntary Assignment.

On reading and filing the petition of Harry B. Gates, Assignee, reciting and concerning his inability to place insurance on the property of said Estate, and for instructions regarding the care and custody of said property, it is ordered that said Assignee is hereby authorized to employ and pay a watchman at reasonable wages to watch and take care of said property.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said Court within and for the said court began and held at the Court House in the City of Waukegan in the said County and State aforesaid on Monday the sixth day of February in the year of our Lord one thousand eight hundred and ninety-three (A. D. 1893.)

240 Present the Honorable Francis E. Clarke, Judge.

Attest: ALBERT L. HENDEE, *Clerk.*

Be it remembered that heretofore to-wit on the twenty-third day of February in the year of our Lord, one thousand eight hundred

and ninety three the same being one of the days of the said term of the said Court the following among other proceedings were had.

In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

Now comes the O. S. Richardson Fueling Company, by Schuyler & Kremer, their Attorneys and file their petition to establish the claim and lien of said Company on the tug "H. S. Sill" belonging to said American Mortar Company, defendants, and move the Court for a rule on said defendant to answer said petition within twenty days from this date.

And it appearing to the Court that the defendants have been duly served with notice of the filing of said petition, it is ordered that the defendants — ruled to plead answer or demur to said petition within twenty days from this date.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said Court within and for the said county began and held at the Court House in the City of Waukegan in the said County and State aforesaid on Monday, the sixth day of
241 March in the year of our Lord one thousand eight hundred and ninety three (A. D. 1893).

Present the Honorable Francis E. Clarke, Judge.

Attest: ALBERT L. HENDEE, *Clerk.*

Be it remembered that heretofore to-wit on the eleventh day of March in the year of our Lord one thousand eight hundred and ninety three the same being one of the days of the said term of the said Court the following among other proceedings were had.

STATE OF ILLINOIS, *Lake County:*

In the County Court of Lake County.

MARCH 10, 1893.

In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

Now comes A. B. Gates, by Cook & Upton, his attorneys and presents his petition herein asking leave to sell the certain steam tug belonging to the estate of the above named insolvent, known as the Henry S. Sill, under and by virtue of a certain mortgage described in said petition.

It is therefore ordered that Harry B. Gates, Assignee in the above entitled matter show cause on or before ten o'clock, the 15th day of March, 1893, why the prayer of said petition should not be granted.

242 And afterwards on the fifteenth day of March in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of said Court the following among other proceedings were had.

STATE OF ILLINOIS, *County of Lake, ss:*

In the County Court of Lake County.

In the Matter of the Estate of AMERICAN MORTAR COMPANY, Insolvent. Harry B. Gates, Assignee.

On reading and filing the petition of Harry B. Gates, the assignee herein, for leave to sell all the assets and property of said estate, and the court being fully advised in the premises, doth order:

That the assignee herein proceed forthwith to sell all his right, title, interest, claim and demand in and to all the property and assets of said estate, including ou-standing book accounts and claims, and that said sale be made at public auction at the east door of the Court House in the city of Waukegan, in the County of Lake, in the State of Illinois;

And it is further ordered by the Court that said assignee shall advertise said sale forthwith in a weekly newspaper published in said city of Waukegan, for three successive weeks, and said notice shall contain the time, place, and tems of sale, which terms shall be for cash.

And it is further ordered by the Court that said assignee may, in his discretion, give or publish such further notice of said sale as he may deem advisable.

243 And afterwards on the first day of April in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of said Court the following among other proceedings were had.

STATE OF ILLINOIS, *County of Lake, ss:*

In the County Court of Lake County.

In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

Now on this day comes on to be heard the petition of A. B. Gates, filed herein on the 11th day of March, 1893, and it appearing to the Court that Harry B. Gates Assignee of the estate of the above named insolvent having failed to show cause on or before ten o'clock of the 15th day of March 1893, why the prayer of the said petition should not be granted as required by an order entered herein on the said 11th day of March, and the Court being fully advised in the premises finds that the said insolvent, the American Mortar Company being indebted to Edward G. Crosby, Robert Rice and Joseph Hitchcock, composing the firm of E. G. Crosby & Company, in the

sum of Fifty-five hundred Dollars and interest thereon due on th- 5th day of May, 1892, executed to the said Crosby & Company the mortgage described in said petition, upon the said steam tug known as the Henry S. Sill; that said mortgage was duly recorded and assigned to the said petitioner, and the deed of assignment recorded as set forth in said petition. That by virtue of said mortgage and said assignment the said petitioner is entitled to a lien upon said steam tug to secure the payment of said indebtedness.

The Court further finds that default having been made in
244 the payment of the indebtedness, the said petitioner under the provisions of said mortgage is entitled to sell the said steam tug.

It is therefore ordered that the said assignee surrender possession of the said steam tug to the petitioner A. B. Gates and that the said A. B. Gates be permitted to proceed to foreclose the said mortgage and to sell the said steam tug in pursuance of the power and authority therein contained, and to appropriate the proceeds of said sale in the manner provided in said mortgage.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Francis E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said Court within and for the said County began and held at the Court House in the City of Waukegan in the said County and State aforesaid on Monday the third day of April in the year of our Lord one thousand eight hundred and nine-three (A. D. 1893.)

Present the Honorable Francis E. Clarke, Judge.

Attest: ALBERT L. HENDEE, *Clerk.*

Be it remembered That heretofore to-wit on the Nineteenth day of April in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said Court the following among other proceedings were had.

245 In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

Now on this day comes Harry B. Gates, assignee of the American Mortar Company, and presents his report of the sale of his interest as such assignee, in all the property and assets of said American Mortar Company, including outstanding book accounts, which said interest of said assignee is the property and assets of said American Mortar Company including outstanding book accounts, mentioned and described in the inventory filed in this Court by said assignee, subject to the lien of the four mortgages thereon, mentioned in said inventory, and subject to any and all other liens of whatever name, natu-e or kind, which had accrued, and were in force prior to, and at the time of the making of the said assignment by said American Mortar Company to said Harry B. Gates, as assignee as aforesaid.

Which said sale was made by said assignee at the east door of the Court house in the city of Waukegan, in said County of Lake, on the eighteenth day of April, 1893, at the hour of one o'clock in the afternoon of said day, pursuant to a former order of this Court, authorizing and directing such sale, and the notice of such sale given as by said order required.

And thereupon the Court having examined said report and being fully advised thereto. It is therefore ordered by the Court, that said report stand approved, and said sale of said Assignee's said interest aforesaid in all the said property and assets of said American Mortar Company, including outstanding book accounts, stand confirmed upon Salmon Levinson, the bidder in said report named paying to said assignee twenty-nine hundred dollars (2900) in cash,
246 the full amount of his bid in said report mentioned, on or before ten o'clock in the forenoon of April 25th, 1893, unless objections to such confirmation of said sale be filed before ten o'clock in the forenoon of April 25th, 1893, and that upon the making of an order by this Court making said approval of said report and said confirmation of said sale, absolute said Assignee make and deliver to said Salmon Levison, the said bidder, at said sale, a proper bill of sale, or conveyance, of said interest, as above defined and specified, in all the property and assets of said American Mortar Company, including outstanding book accounts mentioned in said inventory, subject to the mortgages and liens above mentioned.

Said sale of said Assignee being of all his right, title, interest and estate in and to said property and assets as such assignee. Nothing contained in the order shall be construed as an assumption or any agreement on the part of purchaser to pay said liens or mortgage.

And afterwards on the Twenty-second day of April in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of said Court the following among other proceedings were had.

In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

On this day comes James M. Condit by Cooke & Upton his attorneys and presents his petition herein and on motion of said James M. Condit, petitioner, by his said attorneys, it is ordered that Harry B. Gates, Assignee of said American Mortar Company, Insolvent, be ruled to show cause why the prayer of said petition should
247 not be granted, by ten o'clock A. M. of April twenty-fifth, A. D. 1893.

And afterwards on the twenty-fifth day of April in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said Court the following among other proceedings were had.

In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

On this day comes James M. Condit by Cooke & Upton his attorneys, and objects to the confirmation of the sale, by Harry B. Gates the Assignee of the property and assets of the estate of the above named Insolvent, made on the eighteenth day of April A. D. 1893 as shown and reported by him in his report thereof filed in said Court in the above entitled matter on the nineteenth day of April A. D. 1893. And also to the confirmation of said report.

And said objection coming on to be heard in open Court and having been so heard and the Court being fully advised in the premises, it is ordered that said objections be overruled and said order of April nineteenth be and the same is hereby made absolute.

And afterwards on the twenty-sixth day of April in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said Court the following among other proceedings were had.

248 In the Matter of the Assignment of THE AMERICAN MORTAR COMPANY, Insolvent.

Now on this 26th day of April A. D. 1893 comes Salmon Levinson and enters his motion to have set aside the orders of this Court herein made on the 19th day of April A. D. 1893, and the 25th day of April A. D. 1893, and the sale in said orders mentioned, basing his motion on the following grounds:

That he, said Salmon Levinson, is the bidder for the interest of the assignee of said insolvent in its property and assets at the sale in said orders mentioned, that the assignee of the mortgages in said orders mentioned is now in possession of the property and assets of said insolvent, or a part thereof.

That he deposited with the assignee of said insolvent twenty-nine hundred dollars ($2900) the amount of his bid at said sale, to be payment of said bid only on condition, that he could get possession of the property and assets of said Insolvent, that he cannot get possession of said property and assets except by litigation; and that he declines to make absolute payment of said bid, unless he can get such possession without litigation, and desires to withdraw his said deposit of twenty-nine hundred dollars ($2900); and the — Salmon Levinson appearing in person and by Jacob Newman his attorney, on the hearing of said motion and Harry B. Gates assignee of said Insolvent, also appearing in person as well as by Whitney and Upton, his attorneys, and thereupon the matter of said motion coming on to be heard, and the Court having heard the evidence in open Court, and being now fully advised as to said motion, finds that the grounds for said motion are true.

249 It is therefore ordered, adjudged and decreed by the Court, that said orders of April 19th, 1893, and of April 25th, 1893, be and the same are both hereby vacated, annulled and set aside, and that the sale in said orders mentioned be set aside and disapproved,

and that said Harry B. Gates, assignee as aforesaid, be and he is hereby directed to refund to said Salmon Levinson twenty-nine hundred dollars ($2900) the amount of his said bid so as aforesaid deposited with said assignee.

STATE OF ILLINOIS, *Lake County, ss:*

Proceedings before the Honorable Frances E. Clarke, Judge of the County Court in and for the said County in the State aforesaid at a term of said Court within and for the said County began and held at the Court House in the City of Waukegan in the said County and State aforesaid on Monday the first day of May in the year of our Lord one thousand eight hundred and ninety-three. (A. D. 1893.)

Present the Honorable Francis E. Clarke, Judge.

Attest: ALBERT L. HENDEE, *Clerk.*

Be it remembered that heretofore to-wit on the sixth day of May in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said Court the following among other proceedings were had.

In the Matter of THE AMERICAN MORTAR COMPANY, Insolvent.

Petition No. 3 of Green Dredging Company and Chas. F. Wiard, Praying that Alfred B. Gates et al. be required to answer and appear before the Court for examination, etc.

250 Now comes the petitioners herein, by Newman and Northrup and W. G. Rainey, their attorneys and present their petition in the above entitled cause and move the Court that the prayer of said petition be granted, Whereupon it is ordered by the Court that the defendants James M. Condit, Evans Woollen, and Harry B. Gates, assignee, — ruled to plead answer or demur by ten o'clock A. M. of Wednesday May 10, 1893, and cause set for hearing at ten o'clock A. M. of Saturday May 20, 1893.

In the Matter of THE AMERICAN MORTAR COMPANY, Insolvent.

Petition No. 4 of Green Dredging Company and Chas. F. Wiard Praying that Harry B. Gates, Assignee, be removed as such assignee, &c.

Now come the petitioners herein by Newman and Northrup and W. G. Rainey their attorneys and present their petition in the above entitled cause and move that the prayer of said petition be granted. Whereupon it is ordered by the Court that the defendants — ruled to plead answer or demur by ten o'clock A. M. of Wednesday May 10th, 1893 and cause set for hearing at ten o'clock A. M. of Saturday May 20, 1893.

In the Matter of THE AMERICAN MORTAR COMPANY, Insolvent.

Petition of James M. Condit for Leave to Foreclose Mortgage.

On motion it is ordered that the above entitled cause be set for hearing at ten o'clock A. M. of Saturday May 20th, 1893.

251 And afterwards on the Eleventh day of May in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of said Court the following among other proceedings were had.

STATE OF ILLINOIS, *Lake County, ss:*

In the County Court of Lake County.

In the Matter of the Assignment of THE AMERICAN MORTAR CO.

On motion of the Green Dredging Company and Charles F. Wiard creditors of said estate who on the sixth day of May, 1893 filed their three several petitions in said cause it is ordered by the court that said creditors have leave to examine Harry B. Gates the assignee of said estate together with all the books, papers & vouchers of said estate—and the Court orders that said Harry B. Gates—assignee herein be and appear at Waukegan, Illinois before this Court at 10 o'clock A. M. on Saturday next May 20, 1893, & bring into Court all the books, papers & vouchers of said estate and submit to a full and complete examination relative to the manner in which he has conducted and managed the said estate & the disposition he has made of the moneys & other properties which have come into his possession as such assignee.

STATE OF ILLINOIS, *Lake County, ss:*

In the County Court of Lake County.

In the Matter of the Assignment of THE AMERICAN MORTAR CO.

The Court having set for hearing the matters involved in the three several petitions filed herein on the 6th day of May, 1893, by the Green Dredging Company and Charles F. Wiard creditors of said estate for Saturday May 20, 1893, on motion of said cred-

252 itors for leave to examine A. B. Gates, Evans Woollen, Hunt H. Howland officers of said insolvent—the Court orders that said creditors have leave to take the depositions of the parties named to be used upon hearing of said petitions or any or either of them so far as competent or admissible and that said depositions be taken before any Notary Public residing at Indianapolis, Indiana, and duly authorized by the laws of the State of Indiana to administer oaths and that the depositions of said parties and witnesses may be taken without any dedimus or commission other than this order at

any time after the entry of this order upon giving Messrs. Whitney & Upton and Messrs. Cook & Upton solicitors for the various parties in interest herein five days' notice of the time & place where such depositions will be taken.

And afterwards on the thirteenth day of May in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said Court the following among other proceedings were had.

In re AMERICAN MORTAR COMPANY, Insolvent.

By agreement of all parties in interest and their respective attorneys, it is ordered that the petition of Green Dredging Co. and Charles F. Wiard to set aside and declare fraudulent, null and void, all purported mortgages on the property of said estate, which petition was filed in this cause on the 6th day of May A. D. 1893, be and the same is hereby made to stand as an answer to the Petition of James M. Condit filed herein on the 22nd day of April A. D., —— and also as an original petition, and that the rule to answer said petition of Green Dredging Co. and Charles F. Wiard remain binding as heretofore entered, provided that the said petition of James
253 M. Condit so filed on the 22nd day of April 1893 may stand as his answer to the said petition of Green Dredging Co. *et al.* filed May 6, 1893.

And afterwards on the 16th day of May in the year of our Lord one thousand eight hundred and ninety-three the same being one of the days of the said term of the said court the following among other proceedings were had.

In the Matter of THE AMERICAN MORTAR CO., Insolvent.

Now on this day comes the assignor in the above entitled cause the American Mortar Co. and a majority in number and amount of its creditors and present to the Court the assent in writing of said American Mortar Co. and a majority in number and amount of its creditors to the discontinuance of all proceedings in the above entitled cause and enter their motion that all such proceedings be discontinued and thereupon said motion coming on to be heard and the Court having heard the evidence and arguments of counsel and being now fully advised in the premises on consideration thereof finds that said American Mortar Co. and a majority in number and amount of its creditors have assented in writing to the discontinuance of all of such proceedings.

It is therefore ordered adjudged and decreed by the Court that all proceedings in the above entitled cause be and they are hereby discontinued pursuant to the statute in such case made and provided.

To which order and decree the Green Dredging Company and Charles F. Wiard, who are creditors of said American Co. except and from which they jointly and severally pray an appeal to the

Appellate Court for the Second District of Illinois which ap-
254 peal is granted on condition that said Green Dredging Co. and Charles F. Wiard *are* either of them taking such appeal file an appeal bond herein within twenty days from this date in the sum of eighteen thousand dollars with sureties to be approved by the Clerk of this Court conditioned that said Green Dredging Co. and Charles F. Wiard or either of them filing such bond shall prosecute such appeal with effect, and pay all and any damages, costs, charges and expenses or either which said American Mortar Co. or Harry B. Gates as assignee of said American Mortar Co. or any creditor of said American Mortar Co. or either *of* any of them may sustain by reason of the taking of such appeal, or by reason of the failure to prosecute such appeal, or by reason of the taking of such appeal in case such appeal shall be dismissed or the judgment or decree of said County Court of said Lake County shall be affirmed, and that said Green Dredging Co. and Charles F. Wiard or either of them have sixty days from this date in which to file a Bill of Exceptions or certificate of evidence herein.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Lake County, ss:*

I, Albert L. Hendee, Clerk of the County Court in and for said County, in the State aforesaid, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true, perfect and complete cop*t* of proceedings in the matter of the estate of the American Mortar Company, Insolvent, as appears of record in Probate Order Book V on pages 147, 161, 162, 224, 330, 369, 375,
255 405, 449, 450, 456, 462, 464, 488, 499, 505 and 512.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Waukegan, this 17th day of January, A. D. 1895.

[SEAL.] ALBERT L. HENDEE, *Clerk.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *County of Lake, ss:*

I, De Witt L. Jones, Judge of the County Court of Lake County, in the State of Illinois, hereby certify that Albert L. Hendee, who signed the above certificate was, at the time of signing the same, and is now, Clerk of the said County Court of Lake County, duly commissioned and qualified; that said Court is a Court of record, having a Clerk and seal; that said attestation is in due form and by the proper officer according to the laws of the State of Illinois, and that the above signature of said Clerk is genuine.

Witness my hand and seal at Waukegan, in said County of Lake this 3rd day of April, A. D. 1895.

DE WITT L. JONES, [SEAL.]
Judge of the County Court
of Lake County, Illinois.

256 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *County of Lake:*

I, Albert L. Hendee, Clerk of the County Court of Lake County, in the State of Illinois, (said Court being a Court of Record), do hereby certify that the Honorable Dewitt L. Jones, whose name is subscribed to the annexed and foregoing certificate, was at the time of signing thereof, and now is, sold Judge of said County Court, duly elected, commissioned and qualified, and that his signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said County Court at my office, in the City of Waukegan, in said Lake County, this 3rd day of April, 1895.

[SEAL.] ALBERT L. HENDEE, *Clerk.*

257 WARREN HUSSEY, a witness called by defendants, being *furst* duly sworn, testified as follows:

Examination in Chief:

Questions by LEWIS C. WALKER, Esq.:

Q. Give your full name.
A. Warren Hussey.
Q. Where do you reside?
A. Terre Haute, Indiana.
Q. How long have you resided there?
A. All my life.
Q. Are you the Mr. Hussey that was connected with the purchase of the American Mortar Company?
A. I am.
Q. And some property in relation to it?
A. Yes, sir.
Q. At Waukegan?
A. Yes, sir.
Q. Were you present in Waukegan at the sale that was made there of the property at the time Mr. Gates was assignee?
A. I was.
Q. Did you see Mr. Levinson there?
A. I did.
Q. Did you know Mr. O'Brien?
A. Yes, sir.
Q. What was his business?
A. He was a contractor.
Q. You knew his firm, did you?
A. Yes, sir.
Q. Were they good and reputable men?
A. Yes.
Q. Solvent men?
A. Yes, sir; good men.

258 Q. State to the jury whether or not Mr. O'Brien bid at that sale?

Mr. KETCHAM: May the Court please, I object to that question, because it is wholly incompetent, irrelevant and immaterial, and that an answer to it would not tend to enlighten any issue whatever in this case; and for the further reason that it is sought by this testimony to vary and contradict the force and effect of the judgment of the Circuit Court of Cook County, Illinois; and for the further reason that evidence of this character is incompetent in that if admitted and considered by the Jury, it is and must necessarily be to deny full faith and credit, as required by the Constitution of the United States, to the record of the judicial proceedings had by the Circuit Court of Cook County, Illinois.

The Court overruled the objection, to which ruling the plaintiffs by counsel at the time excepted.

A. He did.

Q. You may state what amount he bid.

Mr. KETCHAM: May the Court please, we object to that question, for the reason that it is entirely immaterial what amount he bid; that whether he had bid five thousand dollars, or five hundred thousand dollars, or five million dollars, *non constat,* that he would have paid the money; *non constat,* that it would have been confirmed by the Court; *non constat,* that what would have happened, what did happen in point of fact after that time with reference to another bid that so far as the purposes of this case is concerned was identically the same as the other, that the sale was not confirmed because this witness, or Mr. Condit, got physical possession of the prop-
259 erty; and as to the extent of the bid, therefore, it is wholly immaterial, because this court has no right itself, nor has no right to permit the Jury to indulge in the domain of speculation as to whether if a bid had been made, and had been accepted, and had been reported, and had been approved, and had been confirmed, that it would not have fallen to the ground just as the other bid on the same day fell to the ground as shown by the evidence in this case, by the record in this case; not depending for that upon the uncertainty of human testimony, but by a solemn record in this court that the sale was disapproved and set aside because of the possession taken by the mortgagee; and this Court cannot permit this evidence to go to the Jury as competent and relevant when by doing so this Court would require the Jury to say that what had been done with reference to another sale, that so far as the purpose of the assignee was concerned was abandoned, would not have been done with the bid in the event that Mr. O'Brien had made a bid.

The hour of 12 o'clock having arrived, pending the ruling of the Court upon the Plaintiffs' objection, the Court took recess until two o'clock P. M.

2 O'CLOCK P. M.

The Court met pursuant to adjournment.
Present the same as before recess.
The hearing of the evidence was resumed.

Examination-in-chief of the witness, WARREN HUSSEY was resumed as follows:

Questions by Judge WALKER:

260 The COURT: I will overrule the plaintiffs' objection to the question put to the witness just before recess.

To which ruling of the Court the plaintiffs by Counsel at the time excepted.

Q. Now, Mr. Hussey, you may answer the question.
A. Do you want the bid on the first sale?
Q. Yes, sir.
A. He bid in the neighborhood of six thousand dollars.
Q. But it was finally struck off to some one—Howard and Birwin?
A. Yes, sir.
Q. When it was put up the second time you may state to the jury whether you bid?
A. I did.
Q. Do you remember how much you bid?
A. Well, about $2800 or $2900, I am not sure which.
Q. Was that at the time when Mr. Levison finally bid it off?
A. Yes, sir.
Q. You may state to the jury why you quit bidding?

Counsel for plaintiffs objected to the question and the Court sustained the objection.

Q. What act, if any, on the part of Mr. Levison was it that induced you to quit bidding?

Counsel for plaintiffs objected to the question as wholly immaterial and for the further reason that it is leading and suggestive.

The COURT: If anything was stated there it would be competent, but I do not think it would be competent otherwise.

261 Judge WALKER: The defendant offers to prove by this witness that the reason that he quit bidding was because he would not bid against the attorney for the assignee who was bidding against this witness at that time, and that the witness refused to make any further bid on account thereof, and that the witness did not believe that the attorney was bidding in good faith.

The plaintiffs' objection being renewed the Court sustained the same, excluding the testimony offered; to which ruling the Defendant, by counsel, at the time excepted.

Q. You may state whether or not you heard all the conversation that took place between the parties there at the time, or a portion of it, at the time of the sale?
A. I think only a portion of it.

Q. You may state whether or not you saw any one leave the bidding and go to the telephone?
A. Yes, sir, Mr. Levison did.
Q. Did he say where he was going to the telephone?
A. He was going to telephone to the Chicago Office.
Q. When he came back state whether or not he bid again, or not?
A. He did.
Q. You may state whether or not, Mr. O'Brien bid at the second offering for awhile, that you bid on?

Mr. KETCHAM: May the Court please, we object to that question for the same reasons heretofore stated in objection to the other question to this witness.

The Court overruled the objection, to which ruling the plaintiffs by counsel at the time excepted.

A. He did.

Q. I will ask you if you heard any announcement by Mr.
262 O'Brien if any reason was given why he quit bidding, any public announcement, and in the presence of Mr. Levison?

Mr. KETCHAM: That is objected to by the plaintiffs, may the Court please, because it is immaterial whether he heard, or not. If Mr. O'Brien said anything as to his frame of mind Mr. O'Brien is a competent witness. What he said is simply hearsay evidence and is not competent from the witness, and is not material, and we object also for the same reasons stated heretofore in objection to the other question.

The Court overruled the objection, to which ruling, the plaintiffs by counsel at the time excepted.

A. I did not.

Mr. KETCHAM: I will withdraw my objection.

Cross examination.

Questions by WILLIAM A. KETCHAM, Esq.:

Q. Where do you live?
A. Terre Haute, Indiana.
Q. Are you in business in Indianapolis?
A. No, sir.
Q. Are you in busines in Terre Haute?
A. I am a Teller in a National Bank over there.
Q. How long have you been at Indianapolis recently?
A. I came here this morning.
Q. And you are expecting to go right back?
A. Yes, sir.
Q. You came over here to testify in this case?
A. Yes, sir.
263 Q. That is the only purpose of your coming here?
A. Yes, sir.
Q. You knew of course that you were not compellable to come here if you didn't want to?
A. Yes, sir.

Q. You came over of your own volition?
A. Yes, sir.
Q. You said you were connected with the American Company—in what capacity?
A. I worked for them for three months.
Q. From what to what time?
A. From the first of August until they made the assignment.
Q. They made the assignment then within two or three months after you commenced to work for them?
A. They did.
Q. Did you own any stock in the company?
A. I did not.
Q. Did you hold any mortgages on the company?
A. No, sir.
Q. Did you at any time hold any mortgages on the company?
A. I bought the mortgages after the assignment.
Q. After the assignment you bought the mortgages from whom?
A. Mr. A. B. Gates.
Q. Was Mr. Condit interested with you in the purchase?
A. He was.
Q. You and he were jointly interested in the purchase?
A. Yes sir.
Q. He didn't buy first and then sell to you?
A. No sir.
Q. And when did you buy those mortgages?

Judge WALKER: May the Court please, no part of this is cross-examination. I do not know that I care to object but we
264 have interrogated him as to nothing of that kind whatever.

The COURT: I think that is true, Mr. Ketcham; it is not cross-examination.

Q. You said that you yourself made a bid of $2800?
A. Yes sir.
Q. Now, at the time of making the bid I understand you were not a stockholder?
A. No sir.
Q. At the time of making the bid were you a mortgagee?
A. I had already bought the mortgages.
Q. Had you bought all the mortgages that A. B. Gates held?
A. I think we had.
Q. Had you bought all the mortgages on the property?
A. I think so.
Q. What amount of mortgages did you hold on the property at the time you were bidding?
A. Well, I think it was thirteen or fourteen thousand dollars; in that neighborhood.
Q. There were some liens on it besides the mortgages you held?
A. Yes, sir.
Q. To what extent were they?
A. Possibly fifteen hundred or two thousand dollars.

Q. At that time you were not in possession, were you?
A. No, sir.

Witness excused.

265 Mr. E. B. GATES: Now, may the Court please, the defendant will offer and read in evidence the depositions of Walter S. Horton, Thomas F. Tipton and John S. Stephens, taken on behalf of the defendant in this case at Peoria, Illinois, May 3, 1899.

The said depositions were admitted and read in evidence, the same being in the words and figures following, to-wit:—

STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court, April Term, A. D. 1899.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON,
Plaintiffs,
vs.
HARRY GATES, Defendant.

Complaint No. 46388. Room 1.

The plaintiffs in the above entitled cause are hereby notified that on the 3rd day of May, 1899 at the office of Stevens, Horton & Abbott, Nos. 300-308 Y. M. C. A. Building in the City of Peoria in the County of Peoria and State of Illinois between the hours of 8 o'clock A. M. and 6 o'clock P. M. of said day, before some officer authorized to take depositions, the defendant will proceed to take the depositions of John S. Stevens and Walter S. Horton witnesses, to be used in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.

Dated this 26th day of April, 1899.

266 BAKER AND DANIELS,
LEWIS C. WALKER, AND
EDWARD E. GATES,
Attorneys for Defendant.

We acknowledge service of the above notice, and waive dedimus and certificate of official character of officer before whom said depositions are taken, this 26th day of April, 1899.

CHARLES MARTINDALE,
Attorney for Plaintiffs.

STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court, to the April Term, A. D. 1899.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON, Plaintiffs,

vs.

HARRY B. GATES, Defendant.

Complaint No. 46388. Room 1.

The depositions of Walter S. Horton, Thomas F. Tipton and John S. Stevens, witnesses produced and sworn to before me Chas. P. Watson, a Notary Public within and for the County of Peoria and State of Illinois, at the law offices of Messrs. Stevens, Horton and Abbott, No. 300-308, Y. M. C. A. Building, in the City of Peoria, in the county of Peoria and State of Illinois on the 3rd, day of May A. D. 1899, pursuant to the enclosed notice as to the witnesses Walter S. Horton and John S. Stevens, and by agreement between the parties as to the witness Thomas F. Tipton. These depositions were taken on the part of the defendant in a certain action now pending in the Superior Court of Marion County,
267 (Room 1), in the State of Indiana, wherein Jacob Newman, George Northrup, Jr., and S. O. Levinson are plaintiffs and Harry B. Gates is defendant.

Mr. Edward E. Gates appearing for the defendant.

Mr. George Northrup, Jr., appearing for the plaintiffs.

It is agreed and stipulated by and between the parties hereto that these depositions shall be taken orally, the questions and answers to be taken down in shorthand by the Notary, reduced to writing by him or under his direction and afterwards signed by the respective witnesses, except as to the signature of Thomas F. Tipton to his deposition the same being hereby expressly waived.

It is further agreed by and between the parties hereto that the deposition of Thomas F. Tipton shall be taken at Peoria, Illinois, at the same place as the other depositions with the same effect as though taken at Bloomington, Illinois pursuant to the notice on the 4th day of May A. D. 1899.

268 The said WALTER S. HORTON, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Direct Examination by Mr. EDWARD E. GATES:

Question 1. What is your name, age, occupation and residence?
A. Walter S. Horton; 41; lawyer; Peoria, Illinois.
2. In what courts of Illinois have you practiced law?
A. In the Circuit, Appellate and Supreme Courts.
3. How long have you practiced law in Illinois?
A. 17 years.

4. Have you practiced in assignments under the Illinois Statute of assignments for the benefit of creditors?

A. I have.

5. Are you familiar with the law with respect to assignment proceedings under the Illinois Statute governing assignments for the benefit of creditors?

A. I think so.

6. What in your opinion, is the law of Illinois as to whether or not in a proceeding in assignment for the benefit of creditors, an order of the Court having jurisdiction thereof must be procured charging the trust estate with the expenses and attorneys' fees and other similar costs and charges in order that the assignee may be protected from personal liability?

A. In my opinion the law of Illinois is, that an assignee will be personally liable for attorneys' fees and can only be protected by way of reimbursement, or in securing reimbursement, by an order of court which may be obtained prior to the incurring of the expense or in settlement of his accounts.

7. Suppose that a corporation desires to make an assignment for the benefit of creditors, pursuant to the statutes of Illinois
269 controlling the same, and desires that the assignment be made to a person named by it, and that the corporation goes to a firm of lawyers in the city of Chicago, Illinois, and states the object of its call and names the person to whom the assignment should be made, and that the person to whom the assignment is to be made, desires that the said attorneys act as the attorneys for the assignee when said assignment is made; and suppose, that the said person is a layman and a non-resident of the State of Illinois and has no knowledge of the laws of said State; and suppose, that the said lawyers duly prepared and filed the deed of assignment and performed other valuable and proper services for the trust estate in their capacity as attorneys for the assignee; and suppose, that the said attorneys were requested by the said assignee to procure any and all orders of Court which would be necessary to protect him from personal liability for their attorneys' fees and expenditures and costs and charges of administering the said estate; and suppose, that the said attorneys fail and neglect to procure an order of Court authorizing the assignee's employment of them as attorneys, or authorizing the expenditures and costs and charges of the assignee in administering the said estate, what is your opinion as to whether or not, under the law of Illinois, the said person so named as assignee would have a cause of action against the said attorneys for the attorneys' fees, costs and charges obliged to be paid by him by reason of said neglect and failure upon the part of said attorneys to attempt to procure said order or orders?

A. If the question implies that an order was to be obtained through which the assignee would not be personally liable, I do not think the assignee would have a cause of action, because, I think, he would be personally liable, notwithstanding the order.

270 8. Assuming the same facts as set forth in question No. 7, if the attorneys were requested to procure any and all orders which would be necessary to protect him, or reimburse him, for per-

sonal liability for their attorneys' fees, expenditures, costs and charges of administering the estate and failed to procure any such order or orders, what is your opinion then as to whether or not, under the law of Illinois, the person so named as assignee would have his cause of action against the said attorneys for the attorneys' fees, costs and charges obliged to be paid by him by reason of said neglect and failure upon the part of said attorneys to procure such order or orders?

A. A cause of action would not necessarily be established by the failure of the attorneys to procure the order.

9. Assuming the same facts to be true as set forth in question 7 and 8, with this additional fact, that the said attorneys neglected to apply to the Court having jurisdiction of the said assignment and failed to make any attempt to procure said order or orders, what is your opinion, under the law of Illinois, as to whether or not the said person so named as assignee would have a cause of action against the said attorneys for the attorneys' fees, costs and charges obliged to be paid by him by reason of said neglect to apply for said order or orders and failure to attempt to procure said order or orders upon the part of said attorney?

A. My opinion is that the assignee would have a cause of action against the attorneys for any loss in consequence of a neglect to comply with his directions.

10. Assuming these same facts to be true as in questions 7, 8 & 9, suppose that afterwards the said attorneys bring their action in assumpsit against the said assignee personally for their attorneys' fees and obtain a judgment therefor, you may state whether
271 or not, in your opinion, under the law of Illinois, the said assignee so personally sued would have an election of remedies, viz:—to either set up the said neglect by special plea of by way of recoupment in the suit brought by the attorneys, or to permit a judgment to be taken by them and afterwards set up the said neglect and failure to procure said order or orders in an original action against said attorneys?

A. In my opinion he could urge it either as a matter of defense, or as a separate cause of action.

11. Assuming the same facts to be true as in Interrogatory 10, and assuming these additional facts, viz: suppose that th- assignee's sale is ordered by the Court and that the attorneys for the assignee, without his consent, and in their own behalf, fraudulently by-bid, thereby preventing a sale of assets of said estate to a *bona fide* bidder, out of which *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys' fees under order of court, thereafter to be obtained, assuming that such order could be obtained, and suppose that afterwards the assignment proceedings are thrown out of Court by consent in writing of the debtor and a majority in amount and number of the creditors of said corporation pursuant to the Illinois statutes, which was done in the absence of the said assignee and without his knowledge, but with full knowledge upon the part of his said attorneys, and no funds were left in the hands of the court from which the assignee could reimburse himself for the said attorneys' fees, or expenditures,

costs and charges in administering said estate, and before said assets were thrown out of court, the said attorneys fail and neglect to attempt to procure any order or orders protecting or reimbursing the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate, what is your opinion as to whether or not, under the law of Illinois, the said assignee in a suit brought against him personally by the said attorneys for their fees would have an election of remedies, viz:—to set up said facts and failure upon the part of said attorneys to attempt to procure said order or orders by special plea, or by way of recoupment or to permit a judgment to be taken against him and afterwards set up said matter in an original action brought by him against the said attorneys therefor?

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A. In my opinion he would have the election, either to set up the negligence of the attorneys as a defense to their suit for fees, or bring a separate action or suit for damages resulting from such supposed neglect.

12. What is the statutory law of the State of Illinois governing discontinuence of assignment proceedings?

A. Sec. 15 of Chap. 11, Revised Statutes of Illinois, being the chapter of assignments for creditors, is the section of the Statutes of Illinois covering the discontinuance of assignment proceedings and is as follows:—"All proceedings under the Act of which this (section) is amendatory may be discontinued upon the assent, in writing, of such debtor, and a majority of his creditors in number and amount; and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect."

13. What is the statutory law of the State of Illinois regarding pleading and special defenses under the general denial and giving notice thereof in writing and also the statutory law of Illinois regarding set-offs as to how it may be plead in practice?

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A. Sections 28 & 29 of Chap. 110, Revised Statutes of Illinois, are as follows:—"Sec. 28.—The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defenses, or may plead the general issue, and give notice, in writing, under the same, of the special matters intended to be relied on for a defense on the trial; under which notice, if adjudicated by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts stated therein, as if the same had been specially pleaded and issue taken thereon."

Sec. 29. The defendant in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof, under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demands, and the verdict shall be given for the balance due. And if it shall appear that the plaintiff is indebted to the defendant, the

jury shall find a verdict for the defendant, and certify to the court the amount so found; and the court shall give judgment in favor of such defendant with the costs of his defense. If the cause is tried by the court, the finding and judgment shall be in like manner."

274 Cross-examination.

By Mr. GEORGE NORTHRUP, JR:

1. Do I understand you to say that it is the law of Illinois, that where an assignee for the benefit of creditors in this State employs attorneys and counsel in and about the management and conduct of the affairs of the estate, that the assignee is personally liable to the attorneys for their fees?

A. In my opinion that is the law.

2. I also understood you to say, if such an assignee has employed counsel and attorneys in that manner and has incurred attorneys' fees in that regard that he is entitled, if the fees are reasonable and necessary for the conduct and protection of the estate, to go into the County Court, where the assignment proceedings are pending, and get an order that he be allowed the amount of these disbursements in his accounts as assignee?

A. I don't remember of making any statement about that, but I think he would be allowed in the settlement of his accounts for any reasonable expenditure of that character.

3. How many assignment proceedings of this character have you personally had charge of?

A. Well, I cannot say; I suppose I have had to do to a greater or less extent with anywhere from ten to twenty.

4. In any of these cases did you personally represent the assignee in looking after the estate in his behalf?

A. Yes, in some of them.

5. In how many of them?

A. I cannot answer positively, but I should say in four or five, possible half a dozen.

6. As a matter of fact, Mr. Horton, where an assignee has an estate of this character in his charge which requires the services of counsel or attorneys in its conduct, management and pro-
275 tection, it is his duty to employ reasonable competent attorneys in that regard if he is not a competent attorney himself, is it not?

A. I should think where an attorney's services were required, he ought to employ one.

7. In your experience in managing and looking after such estate, did you ever go into the County Court in advance of the employment of an attorney in and about the estate and secure an order of the court authorizing your client, the assignee, to employ such attorneys?

And. I never did.

8. Do you consider it any part of the duty of an attorney for an assignee, who is of opinion that certain matters connected with the estate require legal services, to go into the County Court where the assignment is pending, prior to rendering any legal services for the

assignee, and obtain a preliminary order authorizing the assignee to employ you as such counsel?

A. Not in the absence of any order so to do.

9. Not in the absence of a specific order from the assignee so to do?

A. Yes sir.

10. Suppose that you were representing an assignee and there were certain matters connected with the estate which, in your opinion, required the legal services of an attorney, and suppose that the assignee had directed you to go into court and get a preliminary order authorizing the employment of yourself, or competent counsel, by him in that regard, and suppose the services had been afterwards rendered; is it not a fact that in order to secure the allowance of these items to the assignee as a credit in his accounts it would be necessary to make a showing to the court at the time his accounts were settled as to what services the attorneys had performed
276 and as to whether or not the services were reasonable and necessary and what their reasonable value was?

A. The extent of the showing that would be necessary upon a settlement of the accounts of the assignee would depend upon their original order.

11. Well it would be necessary before he could be allowed that settlement in his account according to your theory, if such an order was made, that he should show the services were properly rendered, reasonable in extent and that their reasonable value was the amount — the items for which he claimed credit?

A. Or that it was within the terms of the original order.

12. Have you in mind any authority or decision of the Supreme Court of this State holding that in any case it is necessary for an assignee to secure a preliminary order from the County Court authorizing him to employ counsel?

A. I have not.

13. Do you know of any such case?

A. I understand your question to mean before any allowance will be made in settlement of his account?

14. Before he employs counsel?

A. I will say that I do not.

15. Then your opinion that where an assignee specifically directs the attorney to go into the County Court and obtain an order in advance authorizing the employment of counsel it should be done by the attorney, is not based on any decision of the courts of Illinois to your knowledge.

A. I do not think that follows from my last answer.

16. Is it based upon any such decision?"

Mr. MARTINDALE: We move to suppress the answer to Question 16 for the reason that the same is not responsive to the question.

277 The Court sustained the objection; to which ruling of the Court the defendant, by counsel, at the time excepted.

"A. I think the law of Illinois, not only with reference to as-

signment matters but in reference to principal and agent, master and servant or attorney and client, requires the one employed to observe the reasonable directions of his employer.

Plaintiff objects to the foregoing answer as not responsive and moves the Court to exclude it.

Sustained.

17. The question above is directed to obtaining an answer as to whether or not such a course of obtaining an advance order is directed or sustained by any express decision of the courts of this State on that subject to your knowledge?

A. My answer to the preceding question was, that I knew of no decision requiring an assignee to obtain an order of the Court before employing an attorney.

18. And you know of no case where that has been done?

A. I do not.

19. Assuming it is the law of the State of Illinois that an advance order may be obtained by an assignee directing the employment of counsel, in order to obtain such an order would it, in your opinion, be necesary to show to the court that the proposed services were reasonable and necessary for the care, protection or management of the estate?

A. I think so.

20. You think it would?

A. I think it would.

21. And in securing allowances to the assignee for these particular expenditures you would have to show that the attor-
278 neys had actually been employed in that particular?

A. Yes sir.

21. And that they had performed their services with reasonable care and diligence and that the services were reasonably worth what was asked as a credit for them?

A. You would unless that was all covered by the original order and the showing made at the time of the obtaining of the original order.

22. You could not show at the time of the obtaining of the original order that the services would be reasonably performed as to skill or diligence because they were still to be performed?

A. No, you could not then show the character of the performance but the necessity and character of the work to be done of course could be shown.

23. Suppose as a matter of fact no advance order was obtained as to certain given services, but the assignee employed counsel to perform certain services, paid them fees therefor, came into court afterwards and asked for an allowance to that amount, would he not have to show to the court in getting that allowance that the services were necessary and reasonable and performed with reasonable care and liligence and that the amount paid was the fair, reasonable, ordinary and customary charges for such services?

A. If there were any objections to the item he would have to make that showing.

24. And if he did make that showing after the services were performed on the final acounting the court would allow him those disbursements?

A. I should think it ought to.

25. It is the law that the court should allow him those
279 disbursements, is it not?

A. I think that is an expense the assignee would be entitled to be reimbursed for under our proceedings.

26. Then as a matter of fact whether he got the order in advance or got it as a credit afterwards, there would have to be a showing made to the court at some time, either in the final asking for a credit where there was no advance order got, or if an advance order had been gotten then in a combined showing on the two applications, once in the advance order and the other for a credit and that the services were reasonably necessary for the estate for its proper protection, care and management, and that the services were performed with reasonable care and diligence and that the charges therefor were reasonable, fair, usual and customary?

A. I think so.

27. Then as a matter of fact, if an assignee could make that showing on his final accounting in an application for a credit for those disbursements, he would be just as well off and would get just as much of a credit and just as much consideration from the court as he would if he had gotten his advance order?

A. He would be.

28. Then assuming that the services in question rendered by the attorney for the assignee were reasonable and necessary and performed with reasonable care and skill and the charges therefor were proper, usual, customary and reasonable, the assignee would be just as well off, so far as getting those credits allowed him by the court, whether he got any advance order or not?

A. Yes sir.

29. As a matter of fact, the ultimate question comes up on the assignee's application for credit for the amount?

280 A. What question do you mean?

30. As to whether the assignee is entitled to be allowed a credit for those disbursements?

A. No, I think that may depend upon the character of the original order if one has been obtained.

31. I know but I am assuming that the services were proper, reasonable, usual and necessary.

A. I do not know that I can answer any more fully than I have.

32. I now hand you a pamphlet purporting to be the Illinois Official Reporter containing advance sheets of final decisions of the Supreme Court, dated April 12th, 1899, and will ask you to state whether or not that pamphlet is not the official report by the official reporter of the Supreme Court of this State of the decisions of the Supreme Court of this State?

Defendant objects to the question for the reason it is not cross-examination and bears in no way upon the issues involved in this case.

A. It is a pamphlet issued by the Official Reporter of the Supreme Court.

33. State whether the case of Bradley, Smith and Co. vs. Williams, the opinion reported at p. 420 to 428, of that report, is a decision of the Supreme Court of this State?

A. It so appears in the pamphlet.

34. Have you read this decision?

A. Yes, sir.

35. In view of that decision will you state whether or not the position, powers, duties and liability of an assignee for the benefit of creditors are not, so far as his liability for expenses in connec-
281 tion with the Trust are concerned, likened by the Supreme Court to that of an executor, administrator, guardian or other similar trustee?

Counsel for defendant objects to the question as incompetent and immaterial and not cross examination if the question is asked for the purpose of proving by this witness upon cross-examination any matter of the law of Illinois.

A. The Supreme Court in this opinion supports its conclusion that the assignee is personally liable by reference to the examples afforded by decisions involving guardians, administrators and trustees.

36. And is it not your opinion in respect to that liability that an assignee for the benefit of creditors in this State is substantially in the same position as an executor, administrator or guardian. In other words, he is what is said to be acting in *en autre droit?*

Objected to by defendant on same grounds.

A. So far as his personal liability is concerned it seems to be similar.

37. I will now call your attention to the case of Barker *vs.* Kunkel, reported in 10 Bradwell, p. 407, of the Decisions of the Appellate Court of this State, being a decision by the Appellate Court of the First District rendered at the October Term, 1881, and I will ask you to examine that decision and state whether in your opinion it is a correct exposition of the law of Illinois on the subjects discussed.

282 Objected to by defendant as incompetent, immaterial, irrelevant and not cross examination; not competent for the reason that the question does not purport to cross examine upon any of the questions asked by the defendant and does not prove or tend to prove or disprove any of the issues made in this case.

A. I will not attempt to say.

38. That is, you do not consider yourself sufficiently advised to speak?

A. I mean that I could not without considerable examination of the opinion and of the references cited in the opinion state whether the conclusions of the court were in all respects in accordance with the law of Illinois.

39. Calling your attention to a paragraph in that opinion on p.

412, practically the concluding paragraph, where it is said: "The decisions are uniform, that a guardian, executor, administrator or other person acting in *autre droit* is personally responsible to an attorney employed by him professionally in the execution of his duty and not the estate or fund under his care. Nor is this liability in any manner dependent upon the allowance or disallowance by the Probate Court of the claim of the Executor for reimbursement for the money so paid by him." Will you please state whether in your opinion the paragraph quoted is a correct statement of the law of Illinois?

Objected to by defendant for the reason the question asked is an offer to prove upon the cross examination of this witness the law of Illinois as counsel for plaintiff- interprets it.

A. I think so.

40. I will now call your attention to a paragraph in the same opinion at the bottom of p. 409 where it is said;—"It seems
283 also to be settled that an executor will not be allowed counsel fees, or for other services rendered at his instance unless he has paid them. Citing Williams on Executors 1860 and notes; Forward *v.* Forward, *supra;* Modawell *v.* Holmes, 40 Ala. 391." I will ask you if in your opinion that paragraph is a correct statement of the law of Illinois?

Objected to by defendant as not cross examination and as an offer to prove as a matter of fact or attempt to prove the law of Illinois upon cross examination of this witness.

A. I am not able to answer.

41. Do you consider the statement of the opinion entitles it to respect as authority in this State as stating the law of Illinois?

Objected to by defendant on same grounds, and because it calls for the opinion of the witness upon matters wholly foreign to the issues in this case and it is not proper cross examination.

A. It would depend upon whether the Supreme Court has passed upon that precise question.

42. But if it has not passed on the question?

A. It should be taken into consideration in determining the law of this state.

43. And you would — it entitled to respect?

A. Certainly.

44. In the absence of a decision of the Supreme Court of this state on the subject involved in this statement last read to you out of this opinion, would you consider Williams on Executors as being an authority entitled to respect in this state as determining what the law of the State of Illinois is?

284 Objected to by defendant on same ground as before stated.

A. It would be entitled to respectful consideration just the same as any other text writer or decision of any other state would be.

45. In the absence of a decision of the Supreme Court on the question just read to you would you consider the decision of the

Court of last resort in the State of Alabama as an authority on that subject?

Objected to by defendant same grounds as before.

A. I would answer that question the same as I did the last one.

46. In some of your former answers I understood you to say that if an assignee in a voluntary assignment proceeding for the benefit of creditors in this State, claimed a credit in his final account for disbursements made in paying counsel fees in and about the conduct, management and protection of the estate and could show to the county court that the services were reasonable and necessary and that they had been performed with reasonable care and skill and that the charges were usual, customary and reasonable, under the law of this state the Court should allow him a credit for those disbursements?

A. Yes sir.

47. And the Court should do that whether or not the assignee had obtained an advance order to employ counsel or not?

A. Yes sir.

48. Then in saying that if an assignee had specifically
285 directed the attorney to go in in advance and get an advance order authorizing the employment of the attorneys that in such case the attorney should do so? You do not mean to say that such a step would give the assignee any further, other or greater right to a credit on his final account if in fact the services were reasonable and necessary and performed with ordinary care and skill and the charges were usual, customary and reasonable?

A. I think he would be entitled to the same credit.

49. And the getting of the advance order would not put him in any stronger position if the services were in fact as stated?

A. Not to an allowance of a credit.

50. Then in saying that, if the assignee directed the attorney to get that advance order you think he ought to do it, do you mean to say he ought to do it as a sort of a safe guard to rest the assignee's mind from anxiety as to whether or not he was going to be able to prove in the final accounting that the services were reasonable, necessary, &c.

A. Only partly for that reason.

51. Well you say, as I understand it, that if the services were reasonable and necessary and were properly performed and the charges were proper the assignee would get just as good a creditor for the disbursement whether he got an advance order or not. Now, if that be so, and assuming that the services are such and the charges are such, what tangible and definite gain in your opinion would the assignee obtain by getting the advance order if the services were properly performed and the charges proper?

A. None, if when the final credit was allowed, the property was still in the possession of the Court.

52. You have never heard of such an advance order having
286 been made, have you?

A. I never knew it in practice.

54. You do not consider that such an advance order would exonerate the assignee from personal liability?

A. I do not.

55. Suppose an assignee came to you and retained you generally to look after, direct and control all legal matters of whatsoever kind and nature it would be necessary and proper for him as such trustee to have looked after, directed and controlled by a competent lawyer or lawyers, would you not consider it your duty to go into the County Court in advance and get an order authorizing him to employ you in that connection, would you?

A. I would not consider I was neglecting anything if I did not.

56. And if you failed to do it, you would not consider that the assignee had any cause of action against you as an attorney simply on that ground?

A. I would not.

57. Suppose that the assignee requested you to procure any and all orders of court which would be necessary to protect him from personal liability for the attorney's fees, expenditures and costs and charges for administering the estate, would you then consider that that kind of a direction would require, and make it a part of your duty, to go into Court and get an advance order authorizing the assignee to employ you?

A. I think that would only require me to obtain orders so that the assignee would be protected before the property was removed from his hands and not necessarily an advance order.

58. That is, require you to get the assignee allowed a credit for those amounts before the estate got out of his hands?

A. To see to it that the property was not removed from his hands except on payment of these expenses.

58½. Question No. 7 in your direct examination says: "Suppose that the attorneys were requested by the assignee to procure any and all orders of court which would be necessary to protect him from personal liability for the attorneys' fees." As I understand you to say, even this advance order, if it were obtained, would not prevent the assignee being personally liable for the fees but it simply entitled him to reimbursement?

A. I think I so stated in answer to that question on my direct examination.

59. Is there not a distinction in your mind between obtaining an order which would protect the assignee from any personal liability and obtaining an order which would reimburse the assignee for his expenditures?

A. Certainly.

60. As I understand you to say no such order, even an advance order would protect him from his personal liability, that is he would remain personally liable?

A. I think he would remain personally liable unless there was some special circumstances which I do not now have in mind.

61. Then considering this direct question 7 again, suppose that the attorneys were requested by the assignee to procure any and all orders of court which would be necessary to protect him from personal liability, you do not, as I understand it, think of any order of court that could be entered which would protect him from personal liability?

A. I think the attorneys might possibly estop themselves from claiming a personal liability against the assignee.

62. You mean that the attorney might make a special
288 contract with the assignee to the effect they would not hold him personally liable but would hold the estate?

A. I think they might by obtaining certain forms of orders providing that the assignee should not be personally liable estop themselves.

63. You think the attorneys might either make a special contract with the assignee to the effect he should not be personally liable that they would look only to the estate?

A. Yes sir.

64. Or that they might go into court and get an order spread on the record which recited that the estate only should be liable for their fees and the funds in the estate and that the assignee should not have any personal liability to them and by doing so they would practically estop themselves from charging—interrupted.

A. That is what I meant by special circumstances in my previous answer.

65. But do you consider that if this assignee came to you and retained you simply stating to you in a talk or requesting you to procure any and all orders of court which would be necessary to protect him from personal liability for attorneys' fees—would you consider it any part of your duty as an attorney on that kind of a request to go into Court and get an order which would restrict the source from which you could obtain compensation for your services to the estate and would prevent you by estoppel or agreement from looking to the assignee, that is, that you are to go into court and throw away the liability of the assignee and your right to look to him for fees and restrict yourself simply to the estate in Court of problematical value, that is, do you consider that the duty of an attorney in this State is such as to render it neces-
289 sary for him to take that position and deprive himself of the source of compensation?

A. Of course, I do not answer this question as a matter of law, but I think if an assignee so expressed himself I would want a full understanding with him whether he was to be personally — to me or not.

Mr. GATES: That is with the request counsel has supposed.

The WITNESS: Certainly; aside from that I would not think it necessary to say anything to him.

(Mr. NORTHRUP:)

66. This question goes further than that. It says, "Suppose that the attorneys were requested by the assignee to procure any and all orders of court which would be necessary to protect him from personal*ly* liability for their attorneys' fees and expenditures, costs and charges of administering the estate." Would you say that a mere advance order authorizing him to incur expenditures and costs and charges in administering the estate would not prevent his being personally liable to employees generally, labor, laborers, custodians,

watchmen, clerks, and other persons he should employ in the estate?

A. I think it would not.

67. Then if an assignee should make you such a request as stated in direct question 7, you do not see any way in which that request could be complied with do you?

Objected to by defendant as not cross examination.

A. I understood that question as framed to mean an order that would relieve him from any personal liability and in that sense I answered the question as I did.

68. Then you would not consider it part of your duty to go in and try to get any such order as called for in direct question 7, viz: one that should relieve the assignee from personal liability?

290 A. I would not.

69. This advance order we have been talking about is an order you never have known to have been entered. Would it in your opinion be in the discretion of the court to enter such an advance order or not?

Objected to by defendant as not cross examination.

A. I think it would.

70. That is, if an application were made under your view of the possibility of making such an application to the court in advance setting up the necessity, according to the view of the assignee, of incurring certain expenditures for attorneys' fees, it would be in your opinion in the discretion of the court, under any theory of the law, as to whether or not the court would make such advance order or whether the court would say to the assignee, "If you incurred proper, reasonable and necessary expenditures in that regard you are entitled to reimbursement and therefore I will not make an advance order," that would be in the discretion of the court to take that position, would it not?

Objected to by defendant as not cross examination and because the question calls for an answer which does not tend to prove or disprove any of the issues joined in this case and because it is an attempt upon the part of counsel for plaintiffs to prove a fact or facts upon the cross examination of defendant's witness.

A. I think the court would have a reasonable discretion.

71. And that would be an absolute discretion not reviewable, would it not?

Objected to by defendant same grounds.

A. I am not prepared to answer.

291 72. Is your failure to answer that question due to the fact you do not recollect of ever having heard of such an order being applied for and therefore are not familiar with?

A. I have not examined the law to ascertain to what extent the ruling of the court on such applications would be within his discretion.

73. Well, as I understand you, you never have heard of any ruling on that subject?

A. That does not conflict with my last answer.

73½. No, but it is a fact, is it not?

A. If you so understood me, I must have answered that way.

74. Suppose it to be a fact that the attorneys for an assignee had faithfully and diligently performed their duties as attorneys for the assignee in doing everything that was necessary to be done in and about the conduct, management and protection of the estate, that is, that they had duly prepared and filed the deed of assignment and performed other valuable and proper services for the Trust estate in their capacity as attorneys for the estate; and suppose that before the estate was ready for an accounting by the assignee, or for an application by the assignee for the allowance of any sums on account of this compensation,—suppose that period arrives and the assignee, in collusion with the insolvent and a majority in number and amount of creditors, was cognizant of the fact that the insolvent and a majority in number and amount of creditors were preparing an application or petition to the court, under that section of the assignment law you have read, to have the assignment proceedings discontinued; and assuming that the papers were gotten up, the application by the insolvent and the creditors to that effect, with the knowledge of the assignee and with his connivance generally,
292 the papers were taken into the county court where the assignment proceedings were pending and without any notice to the attorney- in question and without their knowledge and for the purpose of getting the estate out of court so as to prevent any possibility of getting the attorneys' fees paid out of the estate; and suppose under these circumstances proceedings were discontinued without the knowledge of the attorneys in question would you consider that the attorneys in question were in any way, or to any extent, responsible to the assignee for not having anticipated such a proceeding by the assignee and the creditors and in order to head it off gone in and got an order allowing the assignee credit for the attorneys' fees?

Objected to by defendant on same grounds as before.

A. The question involves a good many suppositions upon which I do not pretend to be an expert, but in my judgment, if the assignee prevented the attorneys from protecting him he should not hold them responsible.

75. And if that prevention was accomplished by the secret discontinuance of the proceedings and getting the estate out of court by the insolvent and a majority in number and amount of the creditors with the knowledge and consent of the assignee, would you think the attorneys would not be liable?

Objected to by defendant same grounds.

A. It would strike me that way.

76. You are familiar with the common law count used in actions in this state called the *quantum meruit*, are you not?

Objected to by defendant same grounds.

A. Yes sir.

77. Assuming that you were generally retained without any specific discussion as to specific duties, but generally retained by an assignee to look after, direct and control all legal matters
293 of whatsoever kind and nature it would be necessary and proper for him as such trustee to have looked after, directed and controlled by a firm of lawyers, and suppose you assume that duty and acted in that capacity for a period of three months and in that capacity performed a great many services to the assignee and gave him a great deal of counsel and advice and acted for him generally without any specific directions, and suppose afterwards he failed to pay your fees and you sued him in the Circuit Court of this State and your declaration consisted of a *quantum meruit*, what in your opinion would be necessary for you as the plaintiff to prove in order to make out a *prima facie* case for recovery?

Objected to by defendant same grounds as before.

A. A request for the services, the performance of the services and their value.

78. And you would have to show that the services were of some value would you not. You would have to show by evidence what the value was?

Objected to by defendant on same grounds.

A. You would have to show the reasonable worth of the service.

79. And in order to show that you would have to show that the services were performed with ordinary care and diligence, skill and fidelity, would you not?

Objected to by defendant on same grounds.

A. You should show the character of the performance in order to establish the value of it.

80. And you would have to show the character of the services were of an ordinary skillful, diligent and faithful attorneys?

Objected to by defendant on same grounds.

294 A. I presume so.

81. And those elements you speak of are part of the plaintiff's main case that he has got to prove to make out a case for recovery at all?

Objected to by defendant same grounds.

A. I think so.

82. In other words, is it not true you have got to show what the actual, final net value of the services were and that is what you are entitled to recover on a *quantum meruit*.

Objected to by defendant same grounds.

A. I do not think so.

83. Well, you say you have to show what their value was—what do you mean by that?

A. I mean you must show that certain services were performed

and would then show what the usual and reasonable charge for such service is.'

84. And you would have to show their character you say?

A. Certainly that would be one of the elements.

85. Suppose that you were generally retained by the defendant we will say in a lawsuit to generally look after direct and control all legal matters of whatsoever kind or nature which would be necessary and proper to have loked after, directed and controlled in connection with that lawsuit; and suppose you have no special contract for $50.00 per day, or any specific sum, simply a general retainer to do the work without the price being spoken of; and suppose you did a lot of work in the case, preparing pleadings, in examining witnesses and in preparing the case for trial, by gross neglect on your part when the case was called for trial you were not there with your witnesses and the case went by default, the plaintiff getting a judgment on account of your gross neglect through
295 n-t being present and you afterwards sued this man on a *quantum meruit* for your fees in connection with that suit. We will assume that a judgment by default which was obtained through your gross neglect for not being present when the case was called for trial was largely in excess of your fees and would not have been obtained at all if you had been present. In other words, that the defendant had a good defense to the cause which you could have maintained if you had been there and you afterwards sued the defendant on a *quantum meruit* for your fees on that general retainer and you proved up those facts; do you think you could recover at all?

Objected to by defendant on same grounds as before.

A. I cannot conceive in any suit of that kind which I might bring I would prove up all those facts.

85. Suppose all those facts were in evidence in the plaintiff's case do you think you could recover at all?

Objected to by defendant same grounds.

A. I think the plaintiff would be entitled to recover the value of the services based on a usual and reasonable charge for such services which he performed and if the defendant desired to recoup any damage which he might have sustained by reason of the attorney's failure to be present at the trial, he might do so, otherwise the plaintiff would recover for the services which he had performed.

86. Well, the defendant could show the facts on cross examination of the plaintiff could he not? As to this general retainer?

Objected to by the defendant on the same grounds.

A. Certainly he could show facts he desires to bring up for his defense by the plaintiff's witnesses or by his own.

87. It would be strict cross examination of the plaintiff
296 when on the stand to prove up these items—it would be strict cross examination if the defendant cross examined him and

proved by him that on the final call of the case for trial he was not there on account of gross neglect.

Objected to by defendant same grounds.

A. He might or might not do it. The witness might not be asked any questions on his direct examination which would entitle you to a cross examination of that character.

88. Suppose the plaintiff (the attorney) was on the stand and testified to the facts, viz: that he was retained by the defendant to look after, direct and control all legal matters of whatsoever kind and nature which would be necessary and proper for him to look after in the conduct of his defense of that suit; suppose that was the testimony of the plaintiff as to what the retainer was and that he testified as to the things he had done preliminary to the trial. Do you not consider it would be strict and proper cross examination for the defendant to interrogate him as to what the facts were, as to what his conduct was, in the case when it was called for trial?

Objected to by defendant same grounds.

A. I think on that direct testimony the cross examination suggested would be proper.

89. And would it not be competent for the defendant in defense under the general issue to put on affirmative evidence showing what the facts were as to the transactions on the call of the case for trial in reduction of the amount of the plaintiff's recovery?

A. I think so.

90. Do you have in mind any decision of the Supreme Court of this State holding that in a suit by an attorney in assumpsit
297 on a *quantum meruit* where the facts are as supposed that the defendant has his election to either set up the gross neglect of the attorney in the general business of the retainer by way of recoupment in the main suit or let judgment go against him in that suit and bring a subsequent cross action for damages?

A. I have not in mind just at this time any suit by an attorney.

91. Have you in mind any suit in any analogous case such as a physician, artist or any professional services?

A. I can refer to cases in Illinois where the Court has allowed claims of that kind to be recouped and also cases where it has been held an independent suit could be brought.

92. Have you in mind any case in Illinois for an analogous cause of action where it is held that the attorney or other person suing for professional services had sued the defendant for his services on a general retainer on a *quantum meruit* and obtained a judgment against the defendant in that suit, that afterwards the defendant, notwithstanding that judgment is entitled to maintain a new action for damages against the attorney, or other professional person, for some failure, breach of duty or neglect of the attorney or other professional persons in or about or connected with the services for which he obtained his judgment?

A. I think I can refer to cases which substantiate my opinion that he can.

93. Will you kindly give the references?

A. Yes, sir, I will refer you to several cases bearing with more or less directness upon the propositions, viz: Crate *v.* Kohlsaat, 44 Ill. app. 460; Litch *v.* Clinch, 136 Ill. 426; Evans *v.* Huey, 76 Ill. 115; S. Chicago City Ry. *v.* Workman, 64 Ill. App. 384; Lake Superior etc. Co. *v.* Clapp, 50 Ill. App. 306; McEwen *v.*
298 Kerfoot, 37 Ill. 530; Powell *v.* Goodrich, 69 Ill. 556.

94. You think that if the plaintiff's declaration in such a suit was the common count including a *quantum meruit* and a *quantum valebat* and the defendant's plea was the general issue that the defendant could show this case of neglect and the damages arising therefrom by recoupment if he saw fit?

A. If the damages arose out of the failure to perform faithfully the services for which the suit was brought I think so.

95. If the employment of the attorney was a general employment without any specific thing being told him to do, as has been stated to you once or twice, simply a general employment by the defendant to look after all things necessary to be done and the plaintiff was suing for his fees for services performed in connection with that general employment, would you say that in any failure or neglect causing damage in that general employment could be recouped under the general issue?

A. I think it could.

96. But that could be done either by cross examination of the plaintiff's witnesses in a proper case or by offering affirmative evidence for the defendant under the general issue?

A. I don't think it makes any difference where the evidence comes from.

97. But you do not conceive it is necessary under the general issue to file any notice of any kind if you are going to rely on recoupment or anything of that character?

A. I do not.

98. Just the plain issue filed—the general issue?

A. Under our practice recoupment may be shown—under the general issue.

299 99. Without any special plea or notice?

A. Yes sir.

100. Section 28 of Chapter 110 of the Practice Act of Illinois which you have read which says that the defendant may plead as many matters of facts in several pleas as he may deem necessary or may plead the general issue and give notice in writing, under the same, of the special matters to be relied upon, referring to special matters of facts, or give notice of matters of fact which have to be specially pleaded it would be good law would it not?

Objected to same grounds as heretofore.

A. I think so. Our courts hold that any matter of recoupment may be shown under the general issue or you may plead specially as you like.

101. And section 29 of Chapter 110 about pleading or giving notice of set-offs simply requires the defendant to plead or give

notice of matters of set off when he desires to get a judgment over against the plaintiff does it not?

Objected to by defendant same grounds.

A. Where it is a matter of set-off he would have to plead specially or give notice.

102. Or where it was a matter of recoupment and the defendant desired to get a judgment over he would have to plead it?

A. If it were a matter of recoupment he could not get judgment over.

104. If he pleaded it specially and asked for a judgment over?

A. As I understand the matter of recoupment it does not exceed the claim for which the suit was brought.

105. The fact is that under the general issue such claims for damages resulting from failure or neglect in general employment
300 sued for by the plaintiff can be shown by recoupment under the general issue.

A. I think it can if it arises out of the same matter for which the suit was brought, but it must be purely recoupment.

106. If the plaintiff is suijg for his services under a general employment, such as I have referred to several times and the alleged damage is one that is alleged to have arisen in connection with a general employment, or on account of something connected with that general employment, then that is a proper subject of recoupment.

Objected to by defendant same grounds as before.

A. Some of the cases in this state indicate that a defendant might have a judgment over for any balance due him and speak of such defenses as set-offs. I will not attempt to follow the distinctions made in defenses of that kind. If it is purely a matter of recoupment, it can be shown under the general issue, if not, there should be a plea or a notice of set-off; I cannot make it any more specific. I will not attempt to distinguish between the use of the words "set-off" and "recoup" in the decisions of this state in cases of that kind.

107. I do not mean to try to draw any distinction or definition between setoff and recoupment, what I mean is that such matters could be shown under the general issue as a reduction of the plaintiff's claim whether you call it setoff or recoupment?

A. If some of the Illinois cases are followed, it is a matter of set-off and would require a special plea or notice; other decisions speak of it as a recoupment. If it is purely a recoupment, it could be shown under the plea of the general issue.

301 108. Perhaps you and I do not understand each other?

A. I am not going to make it any more specific because, as I say, the courts don't distinguish between the two.

109. What I want to know is whether or not if an attorney is suing on a *quantum meruit* for what his services are reasonable worth rendered under a general employment and under a general retainer in and about all the matters referred to and the defendant pleads plainly the general issue and nothing but the general issue,

whether or not on that trial the defendant could show some points in which the plaintiff was negligent, or failed of his duty in and about that general employment, to reduce the amount of the plaintiff's recovery?

Objected to by defendant same ground as before.

A. As stated by me in my last two or three answers, the decisions of Illinois do not seem to distinguish whether in such a case the damages can be shown under the general issue and as a matter of recoupment, or whether they are setoffs; if the latter there should be a plea and notice and any answers which I may have made are to be taken with this modification.

110. Then you do not feel that you can make any more definite answer to that question than that you have just made?

A. No, no more than in the last three or four answers.

111. Suppose that in the case in question here at bar that the plaintiffs, the attorneys referred to in the direct interrogatories, sued the defendant assignee for their services on the retainer referred to in the direct interrogatories and filed the common counts of *quantum meruit* and *quantum valebat* and then filed the general issue and the case went to trial, and suppose on the trial the defendant cross examined the plaintiffs as to whether or not there
302 had been any by-bidding by the plaintiffs at the sale in question mentioned in the interrogatories and on the defendant's main case the defendant put on witnesses to show, or to attempt to show, that the plaintiff had been guilty of what is called by-bidding and by reason thereof some sales of the assets had fallen through; suppose those matters were gone into in the evidence in that way and the evidence having come to a close the Court found the issues for the plaintiffs on the whole evidence and assessed the plaintiffs' damages at $1350.00. I will ask you whether in your opinion thereafter—having particularly in mind the case of Powell *vs.* Goodrich to which you have referred—the defendant could commence a new action against the plaintiffs for alleged damage, alleged by him to have been sustained by the alleged by-bidding in question or whether the judgment in a former suit where the matter was gone into in the evidence would be considered *re adjudicata* of that question?

Objected to by defendant same ground.

A. Whether the defendant in the supposed suit attempted to take advantage of the failures supposed in the case tried is a question of fact upon which I cannot testify or give an opinion, but the question which you have been supposing was a general retainer for services to be rendered to the assignee as such. The question asked me on direct examination did not relate to a failure to perform the service for the assignee as such, but to a failure to take some action which would protect him personally. I doubt whether under the decisions of this state damages resulting in that way could be set up under the general issues.

Plaintiffs' counsel objects to the foregoing answer as not responsive and moves the Court to exclude it."

303 Mr. MARTINDALE: We object to the answer to that question for the reason that it is not responsive to the question, and move to suppress the answer for that reason.

The Court sustained the objection; to which ruling the defendant, by counsel, at the time excepted.

"112. I have in mind question No. 11, in which there is an assumption that through fraudulent by-bidding on the part of the assignee's attorneys the sale of assets, which would have realized funds for the payment of costs, expenses and attorneys' fees, was prevented. That is one of the elements going into that case, and the next is, that afterwards the assignment proceedings were thrown out of Court, but the fundamental claim there is that by reason of by-bidding the assignee was prevented from realizing funds on the sale. Now, what I wanted to get at in my prior question was, whether that question of fraudulent by-bidding having been gone into on the first trial by the defendant as a ground for reducing plaintiffs' claim and under the general issue he could cross examine plaintiffs in that particular and also offered affirmative evidence in that regard and the issues were found for the plaintiffs in the case and judgment entered, whether or not you would think after having tried that issue in that first suit he would afterwards be permitted to commence a separate action for the same claim of damages, viz: for the damage alleged to have been caused by fraudulent by-bidding or whether the question of by-bidding and damage resulting therefrom would not be *res adjudicata?*

Objected to by defendant same ground- as before.

A. As I understand the question to which you refer it
304 involves assumption that the attorneys were requested to obtain the necessary orders to protect the assignee against his personal liability and that the attorneys, instead of so doing, were a party to, or the cause of, the property being taken
Out. from the custody of the court without obtaining the orders for the assignee's protection as requested. So understanding the question, I cannot answer it any more definitely than I have already done.

Plaintiffs' counsel objects to the foregoing answer as not responsive and moves the Court to exclude it."

Mr. MARTINDALE: We object to the answer to that question for the reason that it is not responsive to the question, and move to suppress the answer for that reason.

The Court sustained the objection; to which ruling the defendant, by counsel, at the time excepted.

"113. Disregarding the direct interrogatories for the present and directing your mind to this proposition; I will ask you what your opinion is as to the following hypothetical question: Suppose an assignee employs an attorney under a general retainer to look after, direct and control all legal matters of whatsoever kind and

nature which would be necessary and proper for him as such assignee to have looked after, directed and controlled by a competent lawyer or lawyers; and assuming that under this retainer the attorney performed a large amount of services for the assignee, and the estate of which he was assignee, for a period of two or three months, and that afterwards the assignee, having failed to pay the
305 attorneys their fees, the attorneys sued the assignee for their fees on the common count and upon a common *mercuit*, and the assignee filed the general issue and on the trial of the case the attorneys proved up the character and extent of their services, their reasonable and customary value and price and on that trial the assignee on cross-examination of the plaintiffs' attorneys, and also by direct affirmative evidence, attempted to prove that at a certain sale of the assets of the estate, at which the attorneys in question were acting as attorneys, the said attorneys fraudulently by-bid thereby preventing a sale of the assets and that by reason of this conduct and nothing else the estate failed to produce any money out of which the assignee could be reimbursed for his expenditures, and claimed on that trial that that conduct was a claim for reduction of the plaintiffs' claim, and assuming further, that those issues having been made and tried those facts having been brought out in the evidence and those claims made on each side, that final judgment went for the plaintiffs. Would you consider that another and subsequent suit could be maintained by the assignee against those same plaintiffs' attorneys for damages caused by this particular alleged fraudulent, by-bidding, or would you consider it was a matter which had been tried and determined in the original suit and disposed of by the original judgment.

Objected to by the defendant on the same grounds as before.

A. The alleged fraudulent by-bidding might be offered in lessening the value of the services to the defendant as assignee (and not estop him from commencing a new suit for failure to take the necessary steps to protect him against his personal liabilities).

Plaintiffs' counsel objects to that part of the foregoing answer enclosed in brackets as not responsive and moves the Court to exclude it.

306 114. On that question it was assumed that this alleged by-bidding prevented there being any moneys or funds in the estate out of which the assignee could have been reimbursed so that whether or not any order had been entered authorizing the assignee to employ counsel to be paid out of the funds would have been immaterial because in the case supposed there would have been no funds left on account of the assets being destroyed by the by-bidding and in the supposed suit it is supposed that the attorneys were suing the assignee for their services and the assignee showed this alleged destruction of assets by by-bidding claiming that the funds of the estate were thereby destroyed or there were no funds in the estate on account of that by-bidding and therefore there was nothing left he could be reimbursed out of and he was

damaged by that by-bidding. Now, the question asked you was directed to whether or not if the attorneys had sued the assignee and he had made that claim in that suit as stated, the attorneys' misconduct having destroyed the assets so there was no funds out of which he could have been reimbursed, whether there was any order entered or not and the case was adjudged against the assignee on that ground he being sued personally, whether he could afterwards sue in a separate suit personally on the ground that he had been compelled to pay out money for the attorneys' services out of his personal funds whereas the attorneys' conduct as alleged in the first suit had utterly destroyed the estate so there was no money to reimburse him, that is, the same claim is set up in both the first and second suits and the same damage alleged in both together with the same result to the assignee, viz: that he was obligated for moneys and the assets were destroyed and therefore he could not be reimbursed.

307 Now, with this explanation, I will ask you whether or not you think the trial of that issue in the first suit was not all that the assignee was entitled to and that he could not try the same issue over again in another suit?

Objected to by defendant — same grounds as before.

A. I will not undertake to state to what extent the facts supposed would be considered under the laws of Illinois as an adjudication of the rights attempted to be set up in the second suit, but personally I can see a distinction in the purposes for which such evidence might be brought out.

115. I was assuming that the evidence was offered in the first suit for the same purpose it was offered in the second, that is, in the first suit the attorneys were suing for their fees and the assignee set up that this alleged by-bidding had destroyed the assets of the estate whereby he could not be reimbursed for the fees and in the second suit the attorneys are suing on the judgment obtained for their fees, the same money only merged into the judgment, and the assignee set up the same facts for the same purpose, attempting to show he was prevented from obtaining reimbursements just as he claimed in the first suit and assuming those are the facts that the evidence is offered for the same purpose, what would you say with reference to it?

Objected to by defendant — same grounds as before.

A. If the issue in the first suit was the same as in the second, the first, I think, would be *res adjudicata*.

116. That is you mean the issue actually litigated? Of course the technical issue in the first suit was the *quantum meruit* and the general issue by the defendant: the technical issue in the second suit was claiming on the judgment obtained in the first suit and a counter-claim of the same matters but the questions actually litigated were the same. That is what you mean, is it?

308 A. I mean that if the defense now raised has already been tried once the former judgment should be *res adjudicate*.

116. I will call your attention to direct question No. 10 which reads

as follows. "Assuming these same facts to be true as in questions 8 and 9, suppose that afterwards the said attorneys bring their action in assumpsit against the said assignee personally for their attorneys' fees and obtain a judgment therefor, you may state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued would have an election of remedies, viz: to either set up the said neglect by special plea or by way of recoupment in the suit brought by the attorneys or to permit a judgment to be taken by them and afterwards set up the said neglect and failure to procure said order or orders in an original action against said attorneys." You state in your answer to that question you thought that the assignee would have an election to set the matter up by way of recoupment in a suit brought by the attorneys or permit judgment to be taken by them and afterwards set up the neglect or failure to secure the original order or orders against the attorney. Did you mean by that to say if they did elect to set it up by way of recoupment in the first suit, litigated it there and exercised their election so to do and the judgment went against them on that point that they could not afterwards bring it up as a cross-action?

A. I meant that any defense they had by way of recoupment which they urged in the prior suit and tried there would be *res adjudicate* of any second attempt.

117. You made substantially the same answer to direct question No. 11—did you have the same intention?

A. The same thing.

309 118. I will call your attention again to direct question No. 7. I understood you to say that if under the case there supposed the attorneys failed to apply for that order authorizing their employment by the assignee that there would be a cause of action, but I understood you to state further on in your direct examination that you restricted that answer to a statement if the attorneys failed to apply to the court for an order reimbursing the assignee for expenditures so that the estate got out of Court and away from the assignee before he was protected and did so by the fault of the attorneys that that was a case in which you meant there would be a cause of action.

A. In whatever way I answered the questions heretofore would be the way I want to be understood.

119. You will please note that direct question 7, and the subsequent qualifications of it made in the succeeding questions, does not include in its language any assumption that by failing to get an order for the reimbursement of the assignee the assignee was in any way prevented from obtaining reimbursement. The question simply says that: "If the attorneys simply failed to get an order authorizing the reimbursement would there be a cause of action," without in any way stating or including in the question that such a failure in any way prevented the assignee getting reimbursement or in any way disposing of the possibility that the assignee could get reimbursement by securing another attorney to make the application. There is no statement in this qustion about the estates having gone out of court so he was not able to get reimbursement. It simply proceeds on the

theory that the assignee employed the attorneys, and directed them to secure the order and the attorneys simply failed to get an order authorizing their employment by the assignee as attorneys, whether that would be a cause of action. I did not understand you on
310 direct examination to say that that in itself would contain all the elements necessary to make a cause of action?

A. I wish to be understood as I answered those questions. I might add that I do not think an assignee would be bound to anticipate that his attorneys would fail to do as he had requested and go off and hire other attorneys to do the work he had requested of them.

120. Suppose that a corporation desires to make an assignment for the benefit of creditors pursuant to the Statutes of Illinois controlling the same and desires that the assignment be made to a person named by it, and that the corporation goes to a firm of lawyers in the City of Chicago, Ill., and states the object of its call and names the person to whom the assignment should be made and that the person to whom the assignment is to be made desires that the said attorneys act as the attorneys for the assignee when said assignment is made; and suppose that the said person is a layman and a non-resident of the State of Illinois and has no knowledge of the laws of the State; and suppose that the said lawyers duly prepared and filed a deed of assignment and performed other valuable and proper services for the Trust estate in their capacity as attorneys for the assignee; and suppose that the said attorneys were requested by the said assignee to procure any and all orders of Court which would be necessary to protect him from personal liability for their attorneys' fees, expenditures, costs and charges of administering the said estate; and suppose the said attorneys fail and neglect to procure an order of Court authorizing the assignee's employment of them as attorneys, or authorizing the expenditures, costs and charges of the assignee in administering the said estate, but suppose further that after the
311 attorneys' services had been performed the estate still remained in Court and there were ample funds there to reimburse the assignee for any expenditures which he might have been compelled to make; and suppose that the assignee could have gone into Court himself personally and presented an account showing that he had expended these sums when the estate was in his hands and they were reasonable and proper, or could obtain any number of other attorneys to have made that simple application; and suppose if it had been made there would have been funds there sufficient to have paid his fees, would you consider that the mere fact the first attorneys had not made the application themselves, but the assignee could have gotten the application made either by themselves or by other attorneys, and there were assets enough to pay him, but the mere fact that the first attorneys did not make the application, would constitute a cause of action on the part of the assignee against those first attorneys?

Objected by defendant on same grounds as before.

A. The question which you have read assumes that the attorneys failed to obtain orders requested to be obtained for the assignee's

protection against personal liability. With that presumption in, I think there would be a cause of action for any loss or expenses resulting to the assignee on account of their failure.

121. Suppose no loss did result from the failure of the first attorneys to obtain the order requested, what would you say then as to whether there was a cause of action by the assignee against the attorneys?

Objected to by defendants same grounds as before.

A. I should think if no damages were sustained there ought to be no cause of action, at least for nothing more than nominal damages.

312 122. Will you please look at direct question No. 11 and state out of what items assumed in that question you think the cause of action would arise?

A. The 7th, 8th and 9th direct questions assume certain facts which are supplemented by direct question 11. Among the other facts it is assumed that the attorneys were requested to obtain orders for the protection, reimbursement or indemnification of the assignee against his personal liability and that with this duty resting upon the attorneys they allowed and were a party to the removal of the goods from the custody of the court without taking any steps to protect the assignee and my answer is based largely upon those suppositions of fact.

123. Then the elements on which you base the ground of a cause of action or resoupment in direct question 11 is the fact that the assignment proceedings were discontinued with the full knowledge of the attorneys in question and that the attorneys in question with this knowledge, that the assets would be disposed of by the discontinuance proceedings, failed to take steps to see to it that before the assets were so disposed of the assignee was reimbursed for his expenditures?

A. What you have stated is one of the suppositions on which my judgment is based but it is only fair to me to base my answer upon all the suppositions of fact suggested in direct question 11.

124. That is what I want to get as to whether you had any other items?

A. None except such as are assumed in the question, and the previous questions.

126. Can you separate in your mind in the cause of action to which you referred in answer to direct question 11 the various items included in that question; it includes there a direction by the

313 assignee to the attorneys to get orders protecting him; also alleges fraudulent by-bidding whereby a sale was prevented; also the failure of the assignee to get the orders of reimbursement before the assets were disposed of. Do you consider all those elements necessary to a cause of action by recoupment or separate causes?

A. I have not examined the question to determine whether all the assumed facts would be necessary but my answer was based upon the facts assumed in the question.

127. Referring again to direct question 11, if as a matter of fact

by alleged by-bidding of the attorneys the assets of the estate had been prevented from realizing any funds out of which the assignee could be reimbursed it would be immaterial, would it not, as to the damages suffered by the assignee whether an order had been entered that the assignee should be reimbursed out of the estate or not, that is, even if an order had been entered that the assignee should be reimbursed out of the estate if the assets were destroyed in this matter, or prevented from realizing anything, the assignee would have suffered just as much damage whether there had been ordered entered that he should be reimbursed or not?

Objected to by defendant on the same grounds as before and also because counsel is arguing with the witness.

A. I do not understand from direct question 11 that the by-bidding supposed destroyed the property.

128. Well, do you understand that it produced any damage to the assets so as to in any way reduce the fund below what would have been necessary to reimburse the assignee?

A. The question simply assumes it prevented a sale to a *bona fide* purchaser.

129. In the last direct question that was asked you, there was some reference to by-bidding, will you please state what your
314 understanding of the phrase "by-bidding" was that you had in mind when answering that question?

A. My understanding by "by-bidding" is to bid it in.

130. Is it not a fact that by-bidding is defined in the books to be standing by at a public sale and making fictitious bids for the purpose of making it appear there are other bidders when, in fact the person making these fictitious bids is not a *bona fide* bidder at all?

Objected to by defendants same grounds.

A. That definition may cover a fictitious bid.

131. As a matter of fact the definition of by-bidding does not include actually buying the property in at a sale does it?

Objected to by defendant same grounds.

A. When I speak *od* bidding it in I mean a bid that is made in the interest of the seller; it was in that sense I used the term "bid in."

132. That is, somebody in the interest of the vendor is standing by and making bids not *bona fide* for the purpose of making it appear there are other bidders at the sale and thereby inducing *bona fide* bidders to bid higher?

Objected to by defendant same grounds.

A. That is what I understand.

133. Referring to these cases you have cited as cases on which you rely for your opinion I will take first the case of McEwen *v.* Kerfoot, 37 Ill. 530. That was a case, as I understand it, brought by a real estate agent against *against* his principal suing for commissions claimed to have been earned by the real estate agent in selling property for his principal, was it not?

A. That is my recollection.

134. I will call your attention to the 5th paragraph of
315 the head notes of that case, which reads as follows: "And the principal was entitled to, and could set off in an action brought by the agent for the recovery of his commissions, any damages he may have incurred in consequence of the execution of the written contract by the agent after he was made aware the principal had repudiated the sale." Do you understand that to be the holding of that case on that subject?

A. I do not find in the text of the opinion a reference to the setting off of the damages in a suit brought by the agent, but I infer that is the effect of the language used.

135. Do you find any language in that opinion which holds that in such a suit by the agent for his commissions the principal would have his election, either to recoup in a suit by the agent any damages which the principal might have suffered by the unauthorized signing of the contract by the agent, or that he could elect on the other hand to let the agent obtain a judgment for his commissioners, and then afterwards, notwithstanding the judgment, sue and recover for the damages?

A. In this case the Court held the damages were entitled to be set off in the suit, as I infer from the ruling of the Court, upon a demurrer to the plea filed in the lower court. I do not find any language used in relation to an election of remedies.

136. Referring to the case of Evans *v.* Huey, 76 Ill. 115, which is another case referred to by you. Is it not a fact that the action in that suit was an action in assumpsit brought by Huey against Evans to recover for services and commissions in making sale of certain real estate under a specific written contract providing for the sale and the commissions?

A. I believe so.

137. Is it not a fact that on the trial of that suit the facts
316 shown were that the plaintiff agent had made the sale of the real estate provided for in the written contract and that after he made the sale the principal gave the plaintiff, the agent, a mortgage which the principal had acquired in closing up the sale with instructions to the plaintiff, the agent, to record this mortgage substantially.

Mr. GATES: Will counsel for plaintiff- kindly inform me as to the purpose of this examination. I want to know in order that I may object to it as cross-examination if it is not offered for some legitimate purpose. I cannot see the relevancy of this examination. Does counsel refuse to answer my question?

(Counsel for plaintiff- makes no response.)

Question objected to by defendant as not cross-examination.

A. I do not remember all the details of the case, but there was a failure on the part of the agent to perform some duty entrusted to him. The statement of the case shows that the mortgage was taken by the vendor to secure part of the price of the land and that that mortgage was left with the plaintiff to be recorded; the failure of

duty sought to be recouped in the case was a failure to record that mortgage.

138. The record of that mortgage was not referred to in the special contract providing for the sale of the land for which the agent sued.

Objected to by defendant as not cross examination.

A. I find nothing in the contract as printed in the statement of the case requiring the agent to record the mortgage.

139. Then the facts in that case were, that the contract provided for the effectuating of the sale by the agent and he did effectuate the sale, but afterwards as a separate transaction the principal, the vendor, got hold of a mortgage, which had been one of the
317 instruments used in closing up the sale, and gave it to the agent and requested him to see it was recorded?

Objected to by defendant as not cross-examination.

A. The mortgage is mentioned in the contract of sale, but nothing is said about the duty of the agent to record.

140. And the Court holds, as I understand it, in this case that the damage to the principal by reason of the failure of the agent to record this mortgage was a separate matter distinct from the contract sued on, viz: the written contract, to effectuate a sale and therefore the principal could not recoup unliquidated damages arising out of the fact of a failure to foreclose that mortgage on a suit on the contract.

Objected to by defendant same grounds.

A. The Court held that inasmuch as the suit was for compensation for the performance of services under a certain contract and the damages arose from a failure to perform an act, not necessarily within that contract for which the suit was brought, a separate suit would have to be commenced by the defendant to recover his damages for failure of the agent.

141. That is all that was held on that point?

A. That is the substance of it on that point.

143. I have examined these authorities upon which you say you base your conclusions that there was an election in this State in a case like that supposed in the direct questions in this case for the defendant, either to recoup when sued or let judgment go there and commence a separate action afterwards, but I have not been able to find any language of the Supreme Court of this State to that effect and in order to shorten this matter and avoid going over the cases one by one I wish you would indicate what language and what case or cases you consider support that contingent?

318 Objected to by defendant as not cross-examination, incompetent and improper because it is a statement of the opinion of counsel.

A. I did not state that I based my opinion upon those cases, but that they were decisions which contributed to that opinion. I do not

feel responsible for the failure of counsel to catch the purport of the decisions and will not take the time to examine them.

144. Referring to the case of Lake Superior Development Co. *vs.* Clapp, 50 Ill. 301, I will ask you whether or not that was not a suit on a note and the defendant attempted to set-off in a suit against the note certain alleged damages which the defendant claimed he had suffered by reason of some act of the plaintiff and that the Court there stated that the alleged misconduct of Coffman (the plaintiff) might be a cause of action in an action on the case, or possibly in assumpsit as a breach of an implied promise to faithfully serve but in either case the action would be for unliquidated damages, which could be set off only if that cause of action grew out of the same subject matter in which the note had its origin; and in effect held the note did not grow out of the same subject matter and therefore the set-off or counter claim could not be set up in that suit.

A. I think the Court did use the language you have read, but I think the further addition should be made to the facts; as I remember the case it was claimed the note involved a compensation of Coffman as agent but the evidence was uncertain as to how much of the note involved such compensation and it was on that ground that the Court said it should be a separate suit.

145. "Now, conceding that the alleged misconduct was a
319 bar to any claim by Coffman for salary, it would not be a discharge of the company from any claims he might have on other grounds. The notice states that the account he presented showed an indebtedness to him of the amount of the note and that included in the account, "were large amounts claimed by him as salary." How large? As much as, or more than the note? Or one half or one fourth as much? Did, in fact, anything on account of salary go into this note? The notice does not tell. A partial failure of consideration cannot be shown under a plea of total failure." That is the part of the decision you refer to, is it not?

A. That is the substance of my reference.

146. Referring to the case of South Chicago City Ry. Co. *vs.* Workman, 64 Ill. App. 383. I find the language of the Court to be as follows: "Now, in an action for wages, defendant may set-off damages occasioned him by negligence of the plaintiff in his employment, and may have judgment for any balance due him." Is there anything else in that opinion which you consider pertains to this question?

A. That at least is the particular part I had in mind in referring to the case.

147. In the case of Litch *vs.* Clinch, 136 Ill. 422, the following language is used: "The general doctrine on this subject is stated by the Vice Chancel-or in Henderson *vs.* Henderson, 3 Hare, 115, as follows: 'In Trying this question I believe I state the rule of the Court correctly, that where a given matter becomes the subject matter of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to a matter

which might have been brought forward as a part of the sub-
320 ject in contest, but which was not brought forward, only be-
cause they have*m* from negligence, inadvertence, or even ac-
cident omitted a part of their case. The plea of *res adjudicata* ap-
plies not only to the point upon which the Court was required by the
parties to form an opinion and pronounce the judgment, but to every
point which properly belonged to the subject of litigation, and which
the parties exercising a reasonable diligence, might have brought
forward in the time.' The foregoing language is quoted by the Su-
preme Court of the United States as a proper statement of the estab-
lished doctrine of *res adjudicata*, in Beloit *v.* Morgan, 7 Wall, 617.
Thus, in Bennitt *vs.* Star Mining Co., 119 Ill. 9, it is said: 'The
doctrine of *res adjudicata* embraces not only what has actually been
determined in the former suit but also extends to any other matter
properly involved, and which might have been raised and de-
termined in it.' In the same case, as also in Kelly *v.* Donlin, 70
Ill. 378, the following statement from a note in Bigelow on Estoppel
is quoted with approval: 'It follows, also from the authorities con-
sidered that a valid judgment for the plaintiff sweeps away every
defense that could have been raised against the action'; (Citing a
number of cases). 'It may be admitted that the defense of set-off,
which a party is not bound to litigate in a pending suit, constitutes
an exception to the general rule. If he does not see fit to insist upon
his set-off as a defense, he will not be precluded from afterwards
bringing a separate suit upon it. * * * But if the claim or
defense is one which the party is bound to present and litigate in
the pending suit, the rule is imperative that it should be submitted
or it will be concluded by the judgment. Wells on Res Adjudicata,
Sec. 250. That the defense of payment is of the latter class
321 cannot well admit of doubt. Payment works an extinguish-
ment or obliteration of the indebtedness paid, and a judg-
ment which establishes the existence of the debt directly and neces-
sarily negatives the fact of payment." Is the matter I have just
read to you substantially the language of the Court you referred to
in that particular case?

Objected to by defendant same grounds as before.

A. I do not recollect as to all of the language but I do recollect as to a portion which you omitted. That portion is as follows: "It may be admitted that the defense of set-off, which a party is not bound to litigate in a pending suit, constitutes an exception to the general rule."

148. I read that?

A. You read that but you did not read what follows: "If he does not see fit to insist upon his set-off as a defense, he will not be precluded from afterwards bringing a separate suit upon it."

149. I read that part also.

A. But not this: "And even if the set-off should be pleaded and no testimony is given in support of it and it is not submitted to the Court or jury, it may be that the mere pleading of the set-off might be so far regarded as in the nature of bringing a cross-action as to

place the defendant, so far as such cross-action is concerned, in the position of any other plaintiff, whose suit is discontinued or dismissed for want of prosecution." I remember the Court used that language.

150. Is it not a fact that the language you have just read is *obiter* in that case and not given on the principal point in question; that all the Court really decided in that case is that a defense of payment is of a class which a party is bound to present and litigate in a pending suit?

A. I don't know to what extent the language I have read
322 was necessary to the decision but it was the language of the Supreme Court of this State.

151. For all you recollect then the language you have read may have been *obiter?*

A. I don't recollect the point at issue well enough to answer why the Court used the language.

152. In the case of Crate *vs.* Kohlsatt, 44 Ill. App. 460, to which you have referred, that was a suit brought by a distress for rent, was it not?

A. Yes, sir, it was.

153. And the defendant attempted to set up as a defense in that suit the damages which he had sustained by reason of an injunction sued out by the landlord which prevented the tenant from using or sub-letting the premises for dramshops, which injunction was afterwards dissolved?

A. That was the substance of the controversy.

154. And the Court there says: "On principle, notwithstanding the case of Gorton *v.* Brown, 27 Ill. 489, it would seem that for maliciously and without probable cause suing out an injunction that is afterwards dissolved, but was injurious while it was in force, a common law action would lie. Here, however, there was no offer to show the elements of malice and want of probable cause, essentials in actions of that class, that is, malicious prosecutions, arrest or attachment. Keber *v.* Mercantile Bank, 4 Mo. App. 195; Iron Mountain Bank *v.* Mercantile Bank, Mo. App. 505. But if these essentials are absent, the only remedy is such as the Statute or a bond may give." And does not that decision so far as it goes to the facts of the case simply amount to a holding that where a landlord sues for distress for rent and the tenant tries to set up damages caused by
the landlord suing out an injunction against the tenant that
323 the tenant cannot make out a case on that point unless he shows or offers to show evidence of malicious and probable cause.

A. The Court in that case held that there being no offer to show the elements of malice and want of probable cause such damages could not be offered as set off but as a basis for that conclusion using this language: "In actions upon contracts—and a distress for rent is of that class—the counter claims, set off, or matter of recoupment, must be such that the defendant can maintain an independent suit for it. The object is to prevent a multiplicity of suits. The defendant has the election to use it by way of defense or bringing a

cross-action. It necessarily follows that as the appellant could not sue the appellee for the supposed damages, he cannot recoup them, but probably does not lose them."

155. Well, the Court says in that case in effect, that if the defendant is able to make out a case of maliciously suing out an injunction and able to show want of malice and probable cause he would have a cause of action does it not?

A. I think that is the difference from the decision, and if he had an independent cause of action he could either have his independent suit, or set-off, or recoup at his election.

156. But the real decision there is that the defendant did not make out any cause of action independent or otherwise.

A. Well, I will have to let you wrestle with the language of it.

157. Do you consider that where a landlord sues a tenant for rent by distress or otherwise the damages caused by an injunction
324 obtained in an affirmative suit by the landlord for injunction against the tenant are damages arising out of the same cause of action?

Objected to by defendant as not cross-examination.

A. That depends on the effect of the injunction and what it relates to.

158. Well the injunction in this case?

A. Based upon this case the Court indicates that if the element of malice was shown it would.

159. Do you consider this opinion a well considered opinion?

Objected to by defendant same ground as before.

A. I have no reason to criticise it.

160. Have you been familiar with Judge Gary's opinions in the first district?

A. Yes sir, I have seen a good many of them.

161. Do you consider the opinions rendered by Judge Gary in the first district, Appellate Court, well considered opinions? And good authority in this State?

Objected to by defendant same grounds.

A. Many of his opinions seem to have been well considered.

163. How about many of the others?

A. Some opinions are brief and did not require any great consideration.

164. These cases you have referred to contained in the Appellate Court Reports in this State are not authority in this State under the Statute except as to the particular case in which they are rendered. Is not that right?

A. I have always understood the opinions of the Appellate Court unless overruled by the Supreme Court are authority and that they are recognized by the different courts of this State.

325 165. I will call your attention to section 34, Chapter 37, of the Revised Statutes of Illinois referring to the Appellate Courts of this State, where it is stated that all opinions or decisions of

said Court upon the final hearing of any cause, shall be reduced to writing by the Court, briefly giving therein the reasons for such opinion or decision, and be filed in the case in which rendered: *provided*, that such opinion shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." That is a correct statement of the law is it not?

Objected to by defendant same ground as before.

A. I think you have read the section correctly but that does not change the effect of these opinions as going to establish the law of the State.

166. I will ask you if the language in the case of Crate *vs.* Kohlsaat, 44 Ill. App., viz: "That the defendant has his election to use it by way of defense or bring a cross-action" is not purely *obiter* in that case—a mere slop over or suggestion of the Court?

Objected to by defendant as a repetition.

A. I think not.

167. In summing up a review of all these authorities in the Supreme Court I have referred to, you do not feel, do you, that those authorities make that proposition you refer to by any means certain as the law of this State?

A. I think those opinions, taken in connection with the other decisions I am not able to refer to because a person cannot recollect all the different decisions one may run across, I think they establish it beyond all question that a defendant has an election either to set-off or recoup damages of that character or to bring a separate suit.

326 158. You mean under the decisions of the Supreme Court of this State?

A. Decisions of the Appellate and Supreme Court and the Common Law generally.

169. Have you briefed up this question and found these authorities yourself?

A. Yes sir, I just spent a few minutes at it to refresh my recollection.

170. How long?

A. Just a short time, as I had occasion to do it from my other work and I found many references which confirmed the same opinion but without taking any note of the cases. I have no doubt of that proposition.

WALTER S. HORTON.

The said THOMAS F. TIPTON being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Direct examination by Mr. GATES:

1. What is your name, age, occupation and residence?

A. Thomas F. Tipton, lawyer; practice law at Bloomington, Illinois; my residence is Normal, adjoining the City of Bloomington, Ill.

2. In what courts of Illinois have you practiced law?
A. In all the Courts.
3. How long have you practiced law in Illinois?
A. Since June 1854.
4. Have you practiced in assignments under the Illinois Statute of Assignment for the benefit of creditors?
A. Yes sir both since the law and under the old Common
327 Law Assignment.
5. Are you familiar with the law with respect to assignment proceedings under the Illinois Statute governing Assignments for the Benefit of Creditors?
A. I think I can say I am reasonably well advised about it.
6. Have you ever been Judge of any of the Courts of Illinois?
A. Of the Circuit Court.
7. How many times and of what Court?
A. I have been elected three times.
8. What in your opinion is the law of Illinois as to whether or not in a proceeding in assignment for the benefit of creditors an order of the Court having jurisdiction thereof must be procured charging the trust estate with the expenses and attorneys' fees and other similar costs and charges in order that the assignee may be protected from personal liability?
A. I do not understand that it has been the practice, so far as I know, to go in the first instance and get an order of that kind. I don't know that that has been the general practice, although I think as a precaution it is a proper way perhaps to do it if I understand the question right.
9. That is, whether any order is necessary to protect him from personal liability. Question 8 is not confined to whether the order should be procured first or afterwards but at some time or other in the proceedings?
A. There must be an order procured for the allowances of the assignee.
10. Suppose that a corporation desires to make an assignment for the benefit of creditors pursuant to the Statutes of Illinois controlling the same and desires that the assignment be made to a person named
by it, and that the corporation goes to a firm of lawyers in
328 the city of Chicago, Illinois, and states the object of its call and names the person to whom the assignment should be made and that the person to whom the assignment is to be made desires that the said attorneys act as the attorneys for the assignee when said assignment is made; and suppose that the said person is a layman and a non-resident of the State of Illinois and has no knowledge of the laws of said State; and suppose that the said lawyers duly prepared and filed the deed of assignment and performed other valuable and proper services for the trust estate in their capacity as attorneys for the assignee; and suppose that the said attorneys were requested by the said assignee to procure any and all orders of Court which would be necessary to protect him from personal liability, or reimburse him, for their attorneys' fees and expenditures and costs and charges of administering the said estate; and suppose that the

said attorneys fail and neglect to attempt and make no effort to procure an order of Court authorizing the assignee's employment of them as attorneys, or reimbursing him for, or authorizing the expenditures and costs and charges of the assignee in administering the said estate, what is your opinion as to whether or not, under the law of Illinois, the said person so named as assignee would have a cause of action against the said attorneys for the attorneys' fees, costs and charges obliged to be paid by him by reason of said neglect and failure upon the part of said attorneys to attempt to procure said order or orders?

A. As I understand the question, a corporation was desirous of making an assignment; they went to a firm of lawyers in the city of Chicago, stated their object, directed to whom the assignment should be made and that it was desired by the assignee and the as-
329 signor that the same attorneys act as attorneys for the assignee when the said assignment should be made; that the assignee was a non-resident of the State and not a lawyer I then understand from the question that the lawyers prepared the assignment, that the deed of assignment was filed and that they performed other valuable services as attorneys for the assignee and for the benefit of the estate and that they were requested by the assignee to procure any and all orders of Court which should be necessary to protect him from personal liability. In such case I would go before the County Court and procure an order for the employment of counsel as a precautionary measure. I doubt, however, whether that would be absolutely necessary but it would certainly be an act of precaution. Allowances are made in practice from time to time to an assignee for expenses and the Statute provides that "on the rendition of a final account by the assignee of said trust to the County Court that said Court may allow such commissions and allowances to said assignee or assignees in the final settlement as may be considered by the Court to be just and right." Under the supposed employment in my judgment it would be the duty of an attorney to see that such allowances were made by the County Court and if they did not and the assignee was injured thereby I am of the opinion that an action on the case as at common law might be maintained.

11. Assuming these same facts, suppose that afterwards the said attorneys bring their action in assumpsit against the said assignee personally for their attorneys' fees and obtain a judgment therefor, you may state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued would have an
330 election of remedies, viz; to either set up the said neglect by special plea or by way of recoupment in the suit brought by the attorneys or to permit a judgment to be taken by them and afterwards set up the said neglect and failure to procure said order or orders in an original action against said attorneys?

A. Assuming that the assignee had a right of action against the attorneys, as indicated in my last answer, then I think the assignee would have a right either to rely upon his right of action at law, or he might elect to recoup the damages. In case he elected to recoup, he would only recover an amount equal to the amount

the plaintiff would be entitled to recover, or, what I mean by that is, he could simply defeat the plaintiffs' action by recoupment; but I do not understand the — in this State is that he is bound to recoup.

12. He has an election?

A. Yes sir, the assignee would have an election; the plaintiff don't have the right of election; it is the defendant in cases of this kind who has a right to elect whether he will recoup or rely upon his original right of action. The plaintiff has no right to an election.

13. Assuming the same facts to be true as in Interrogatory 11 and assuming these additional facts, viz: suppose that an assignee's sale is ordered by the Court and that the attorneys for the assignee, without his consent, and in their own behalf, fraudulently by-bid, thereby preventing a sale of assets of said estate to a *bona fide* bidder out of which *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys' fees under order of Court, thereafter to be obtained, assuming that such order could be obtained, and suppose that afterwards the
331 assignment proceedings were thrown out of Court by consent in writing of the debtor and a majority in number and amount of the creditors of said corporation pursuant to the Illinois Statute which was done in the absence of the said assignee and without his knowledge, but with full knowledge upon the part of his said attorneys, and no funds were left in the hands of the Court from which the Assignee could reimburse himself for the said attorneys' fees or expenditures, costs and charges, in administering said estate, and before said assets were thrown out of Court the said attorneys fail and neglect to attempt to procure, any order or orders protecting or reimbursing the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate, what is your opinion as to whether or not under the law of Illinois the said assignee in a suit brought against him personally by the said attorneys for their fees would have an election of remedies viz; to set up said facts and failure upon the part of said attorneys to attempt to procure said order or orders by special plea or by way of recoupment, or to permit a judgment to be taken against him and afterwards set up said matter in an orinigal action brought by him against the said attorneys therefor?

A. If I understand this question correctly, and counsel correctly understands what I have heretofore stated, and assuming that the attorneys were guilty of that kind of negligence which would make them liable to the assignee, and he brought his original action, the measure of his damages would be the amount of proper allowances to be made by the County Court; that is to say, attorneys' fees, commissions and such other allowances as would be proper to be made by the County Court. If the assignee recovered against the
332 lawyers, I think this would be his measure of damages. Of course, what they are I don't know. *Prima facie*, I cannot say how the damages could be measured otherwise: Of course the value of the legal services would be one item of account which should be paid out of the estate, as hold by our Appellate Court. The commissions, allowances and costs should be paid, whatever they are,

out of the estate so that the assignee is reimbursed for his liabilities in every particular. I do not understand exactly the force of the question as to the conduct of the attorneys in relation to making the bid—just how it would affect the right of the assignee to have the proper allowance made. If there was property enough in the estate to pay these allowances, it should be paid from the estate.

14. If by means of this fraudulent by-bidding a *bona fide* bid out of which he could have been reimbursed was prevented——

A. (Interrupting). What became of the property?

15. It went out of Court before they entered any order protecting him for his costs, charges, etc.

A. Assuming that there was property in Court in the hands of the assignee sufficient to pay these charges and allowances that I have spoken of, it was the duty of the attorneys under the supposed employment to see to it; first, that the allowances were made and that then the allowances were paid out of the estate before the property was permitted to go out of Court.

16. Then in that case would he in a similar manner have an election of remedies, as to whether he could set it up in the suit or could he bring his original action afterwards?

A. As I understand it, this question does not raise the question of the right of an election of remedies. I have stated in my former
333 answer that his right of action at law is an independent action and I have stated what in my judgment would be the measure of his damages and, as I said a moment ago, I do not see that this raises the question of election of remedies, but in addition to what I have said in my former answers, I will say that he can waive his right of action if he desires in suing for the attorneys' fees and recoup or he can refuse to recoup his damages and bring his original action; he has a right to elect which of these two remedies he will seek. This question as I understand it, assumes that the property went out of Court under the 15th Section of the original assignment law by a majority of the creditors and the consent of the necessary parties?

17. Yes sir.

A. It is my true judgment that the true interpretation of the law is that these expenses, including the cost of administration, should have been allowed and paid before the property was discharged by the Court and it was the duty of the attorneys under the supposed employment to see that — was in my judgment.

Cross-examination.

By Mr. George Northrup, Jr.:

1. In the last supposed case, if as a matter of fact, the assignee was sued by the attorney and elected in that suit to recoup his alleged damages for the alleged failure and neglect and offered evidence on the subject and a judgment went for the plaintiff for a substantial amount, what would you say?

Objected to by defendant as not cross-examination because it as-

sumes additional facts and calls for an opinion upon those additional facts on cross examination of defendant's witness.

A. I have no data or facts upon which to give an opinion
334 as to whether or not the defendant in the original action recouped or that what he did amounted to a recoupment. If he elected to go in and recoup his damages and did so and was beaten, or was successful, it would be *res adjudicata* and the end of the controversy.

2. You would give the same answer to the question immediately preceding as to the recoupment in that case?

A. I am of the opinion in the supposed case that a party has two remedies but is only entitled to one of them. If he elects to recoup, he has elected his forum and is bound thereby and, I am of the opinion, he could not litigate the case relying upon a recoupment and after failing and a judgment of the Court against him upon that question being his action at law.

3. Suppose that in this case the retainer of the attorneys in question was a general retainer to look after, direct and control all legal matters of whatsoever kind and nature which would be necessary and proper for him, that is, the assignee, to have looked after, directed and controlled by a competent lawyer or lawyers—that is what you call a general retainer is it not?

Objected to by defendant same grounds as before.

A. Yes sir I would call him a general retainer, and I would say that the supposed retainer perhaps includes that and maybe a little more but not much. A general retainer to do and perform the duties indicated by the question, I think, would require the lawyer or firm of lawyers to do what I have indicated in my answers heretofore.

4. You are very well acquainted, are you not, with the common count of *quantum meruit* and *quantum valebat?*

A. Yes sir, you mean the common count as used in this case including the *quantum meruit?*

335 5. Yes sir.

A. I am reasonably familiar with them.

6. I will ask you whether in your opinion it is the law of this State in regard to such counts—I will quote from volume 2 of Smith's Leading Cases, Hare & Wallace's Notes, p. 41, as follows: "In Chappel *v.* Hicks, 2 C. & M., 214, Bayley, B. said 'The rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied.' Lord Ellenborough's rule, laid down after consulting the Judges in Farnsworth *v.* Gardard, was, *'The claim shall be co-extensive with the benefit.'* In the American Court, the rule on this subject seems to be the same as that now recognized in the Courts here, namely, that where a plaintiff declares upon a general count for work done, goods sold, or the like, under a special contract, the defendant may give in evidence, everything that affects directly the value of the subject of the claim as between the parties, including a breach of warranty in reduction of damages." Do you consider that a good statement of the law?

Objected to by defendant same grounds as before.

A. I regard that as a fair statement of the law as I understand it.

7. I will read further and ask you what you think of this statement of the law from the same work: "Accordingly, it results necessarily from the ground and nature of the action, that, when the plaintiff declares generally, the defendant may show in reduction of damages, everything that goes directly to the consideration, and immediately affects the value of the work; for the assumpsit which the law implies, whether in *quantum meruit* or *indebitatus*, is always commensurate with the actual final value of the article
336 of work. * * * The defendant therefore may show defects in the work or service, and if the plaintiff refers to the contract as evidence of the fair price of the work or article, the defendant may show that this price was based upon a warranty of quality which has proved false, in short from the very nature of the claim which the plaintiff has chosen to make, the defendant may prevent his recovering more than the real, inherent value of the consideration?"

Objected to same grounds as before.

A. I think that is the law of this State.

8. Assuming that to be the law and that under a general retainer, such as is stated here, to do everything necessary to be done in connection with the estate, the attorneys come in and sue on a *quantum meruit* for their services, it is necessary for the plaintiff in order to make out a case to show as part of their main case what services were performed, and, if they are attorneys, the services were performed with ordinary, reasonable care, diligence, skill and fidelity and they have also got to show, as part of their main case, what the services were reasonably worth as their actual final value. That is right, is it not?

Objected to by defendant same grounds as before.

A. I think so.

9. There is a distinction between suing on a *quantum meruit* in that regard and suing on a special contract. That is, if I am employed by you to act as your attorney in and about a certain case and you agree to pay me $50.00 a day for every day I actually spend in Court on that litigation and you do not pay me, I can sue on a special contract and I can set up the special contract in the declaration and set forth that you agreed to pay me $50.00 per day for actual work in Court and that I actually worked in Court
337 three days whereby I am entitled to recover $150.00. All I have to prove to make out a case there would be to show the contract and the actual time I spent in Court in that case?

A. Yes sir.

10. But if I was retained on a general retainer I would have to show these other facts on a *quantum meruit* and if you sued under a *quantum meruit* you would have to show employment, express or implied, and what the services were reasonably worth, and in order

to show that, I would have to show the other facts as to the character of the services, etc?

A. Show what they were and what they were reasonably worth.

11. Assuming this general retainer in question here to do everything connected with the estate and the plaintiff came into court on a *quantum meruit*—the attorneys—and showed the facts and it should appear in evidence that as a matter of fact although they had rendered services in and about the estate yet the services were so defective in one particular that the attorneys were guilty of neglect in one particular which absoltuely destroyed the value of the services to the defendant; that he lost as much by that neglect as he gained by all the other services?

A. As I understand it, the services were performed for the defendant as assignee and were services to the estate for the benefit of the estate. The supposed question indicates no objection to that service, but it indicates a lack of duty to the defendant, the assignee, by not procuring for him the necessary allowances by which he should and would avoid liability?

12. (Interrupting.) Don't you consider that under a general retainer of that kind that part of the attorney's duty was to
338 obtain those allowances?

A. I think so.

13. And that part of the employment was to obtain that allowance?

A. Yes sir.

15. Now, the assignee is not sued here as assignee but is sued on the theory he is an individual simply; Mr. Gates himself employs the attorneys, has the work done and he is now sued for it and Mr. Gates can show, or it is shown in the case, that in equity and good conscience Gates ought not to pay anything because as a matter of fact on account of the failure of one of the fundamental elements under this general retainer Gates was injured and the net, actual final result to Gates was an injury. Now, if the plaintiff can only recover the actual final value of the work and it can be shown by evidence that the final value of the work was an injury, then the services would be worth nothing?

A. The services might have been worth to the estate the full amount of the judgment and I have no doubt they were or judgment would not have been rendered. I do not understand that the question I have attempted to answer in any way make- any complaint against the services performed by the counsel for the estate for the assignee of the estate, for which he became personally liable, but, as I understand the question, they involve simply this question; whether by reason of the neglect of duty on the part of the law firm to procure these allowances provided for under the law and the estate was allowed to pass out of the hands of the assignee where by the assignee was damaged to the amount of his attorneys' fees and the amount of his commissions and allowances and such expenses as he may have had to pay, were lost to him, and the purport of what I have
339 meant to say is, that if the attorneys were at fault in not performing their duty, express or implied by law, so that a

liability was incurred by them to the assignee, that for that liability, of course, he would have his right of action and he has a right to elect whether he will bring an original action or wait, and when sued for the legal services, recoup. He can elect to do either and that is what I mean to say.

16. This original suit was against the assignee personally?

A. I understand that.

17. Is not the theory of a recovery against an assignee personally based upon the theory that the assignee is an individual who has certain work to be done and it is advantageous to him as an individual to have that work done by a lawyer so he can manage that estate and get his compensation and commission from the Court. How can you distinguish, or in other words: Where the assignee is sued individually, how can you say that a question as to the benefits to the estate entered into that suit?

A. I can explain that very readily. I have always entertained the opinion, both as a lawyer and a Judge, that counsel for an estate ought not to be counsel for the assignee, but in this case they were, as I understand these questions. They were to act in a two-fold capacity that is, they were to act for him as assignee and in additoin to that they were to look after his personal interests which, if he had had another lawyer, it would have been the other lawyer's duty to have done and that is the distinction I make in it.

18. How can you disassociate the assignee from the estate? What I mean is this, There is no such thing as an estate as an entity; there is an assignee who is an individual possessed with a legal title to the property which he is to administer; there is no other repre-
340 sentative of the property but the assignee.

A. The assignee has a two-fold interest; a duty I might say to look after the estate, perform his duty in that regard, and also to look out for his own interests. That is to say, for the repayment from the funds to him of his expenses including attorneys' fees, commissions and other allowances.

19. When the assignee was sued in the first suit for the fees, he was sued as an individual; he was interested in that particular suit and litigation and was charged as being interested and liable and in that suit it was a matter of defense to him if he had set up and said "It is true these people are charging me with a liability individually but they are responsible to me individually for neglect of duty to me individually?

A. That is right.

20. Now, then, in that particular suit, where the attorneys are suing him for fees, -he defendant against the attorneys in his individual capacity in relation to his individual interests and liability which he had incurred and if he should set up a recoupment and counter-claim there he would be suing them also in an individual capacity as the person individually liable and individually entitled to be protected. That is the interest and capacity in which he was sued there and the interest which he might recoup there was identical?

A. Yes, it grew out of the same matter and same transactions as I

understand it, and therefore he had a right to recoup if he desired.

21. (Question 20 repeated to witness.)

A. So that I may a little better understood, I will say, suppose that the services of an attorney for the benefit of an estate was
341 $2000.00, or any other sum of money, and that the assignee had employed them to perform those services and they had performed them faithfully and right, they would be entitled to recover for that. I apprehend from the questions they did not bring a suit for any services in procuring these orders and so assumed they were not procured. I am of the opinion that under this general retainer the assignee might have elected to have recouped the damage he sustained by reason of their failure to perform that duty against the services they performed for the estate under the contract with him, but he had a right to elect not to recoup and bring his original action for the damages growing out of the supposed neglect of duty.

22. It is the law, is it not, that a man who is sued, to be entitled to recoup in that suit, must be entitled to recoup in the same capacity he is sued, that is a man who is sued cannot recoup some claim he has against the plaintiff in some other capacity. He cannot be sued in one capacity and recoup a counter claim in another capacity?

A. I understand that the doctrine of recoupment is based, in this State at least, upon the fact that the damages claimed must grow out of the same transaction.

23. That is not the point at all. It is not a question of the transaction but a question of the identity of the defense in the capacity in which he is sued and in the capacity in which he attempts to recoup?

A. I do not understand that a party can recoup unless the parties are the same and that the defense of recoupment grows out of the claim of the transaction upon which the claim of the plaintiff is based.

24. And when you say the parties must be the same, you mean that the defendant must be sued in the same capacity he tries
342 to recoup?

A. Yes. I will say further I am inclined to think without having thought of that question, that the defendant cannot recoup a claim in a capacity different from the capacity in which he is sued.

25. Certainly you and I do not disagree very much only we don't quite understand each other?

A. Well, I try to understand you the best I can.

26. I do not make my questions very clear, I guess. Suppose you retain me on a general retainer to defend a lawsuit for you and generally to do everything necessary to maintain your defense and I do a lot of work for you in the case, drawing pleas, examining witnesses, briefing up the law, but when the case is called by my gross negligence I do not show up at the trial with the witnesses and the case goes by default against you and there is a judgment entered against you for say $2000.00 when you had a good defense and would have been able to make a perfect defense if I had been there when the case was called with my witnesses, and suppose I afterwards sue you on a *quantum meruit* for my fees, setting up that you had retained me to look after that suit, that I had rendered services and my

services were reasonably worth so much, to-wit: $500.00. Now, suppose the case came to trial, I would have to show the employment and show what I had done and all I had done about the case and that I had done it faithfully, diligently and skillfully and that the services were reasonably worth $500.00 to you, would I not, and then if it appeared in my testimnoy, as a matter of fact, that my failure to appear at the trial damaged you $2000.00, I could not recover at all, could I?

A. Not if I recouped.

343 27. Could I recover anything after I made such a showing?

A. Your services might have been worth $5000.00 up to the time when your neglect of duty caused me a damage of $2000.00.

28. Would the actual final value of my work be anything to you under the circumstances? Under the citations I have read you which you stated were good law?

Objected to on the same grounds as before.

A. The danger of my attempting to recoup against a claim of that kind would defeat me of my right to recover from you $2000.00 and in that event, it would, perhaps, be policy for me to let a judgment go against me for the $500.00.

Plaintiffs object to the foregoing answer as not responsive and moves the Court to exclude it.

29. (Question 28 repeated to witness.)

A. It might or might not be, I could not tell.

30. How could it be worth anything if I claim my work was only worth $500.00 and your damage caused by my neglect was worth $2000.00?

A. It might be that your services performed up to the day of trial were worth $500.00 and that under a general retainer you would be entitled to recover unless I come in and recoup and say you are not entitled to recover anything, I am damaged $2000.00 and I recoup; by that I simply defeat your right of recovery and thereby lose my right to bring a separate action against you for $2000.00 and it is not the law of this State that I am obliged to do that.

31. In such a case, you can plead your recoupment specially and recover judgment for the entire difference can you not?

344 A. I do not understand that I am obliged to recoup for that kind of negligence.

32. Do you base your opinion in that particular on any specific decision of the Supreme Court?

A. No sir, I am basing it on the general rule in this State, as I understand it.

33. You are not aware of any decisions of the Supreme Court on that subject?

A. I have not looked up authorities but very little about it. In fact, only casually and with a view to this question, of course.

34. Then it is a fact that you have not any decision of the Supreme Court of this State on which you base your conclusions?

A. I have decisions of the Supreme Court upon which I base my judgment, of course, to this extent. First, that the doctrine of election in the case supposed prevails in this State as I think. I have decisions of the Supreme Court that you cannot recoup except it grows out of the same transaction.

36. The latter propositon we concede, but will you please give me the decision you have in mind as to the doctrine of election you refer to because I have not been able to find one?

A. I will state that I do not think you will find any. The right of action, and it has occurred frequently against parties, is incurred just like any case where a party becomes liable. The general principle is that for the negligence of an attorney the party injured can recover in an original action. This is not qualified in any way except to the extent, as I understand it, that a man if sued for services may elect to set that up by way of defense and then he recovers nothing over.

345 37. Assuming that there are no express decisions of the Supreme Court giving this right of election you speak of, would you go to the Courts of other States to find authorities as to what is the law of Illinois on that subject?

A. No sir, I don't think I would upon that question. I would hold as a Judge, and it is my opinion as a lawyer that the right of action occurs at the time of the injury. That is a common law right of action and the question of recoupment does not arise unless suit is brought on the original transaction and the parties desire to recoup. That is so well understood, I think, in this State that it is hardly debatable in my judgment.

38. Will you indicate to me one decision of the Supreme Court of this State holding that where an attorney sues on a *quantum meruit* for the reasonable value of his services on a general retainer and obtains a judgment against the defendant that the reasonable value of his services were a certain sum—some substantial amount or any sums—and judgment is entered, that afterwards the defendant can bring an action against the plaintiff's attorney for damages for failure or neglect of the attorney connected with that employment?

A. I have not examined the question and don't recollect that that exact question has arisen in this State.

39. Can you give me any authority or an opinion of the Supreme Court of this State where an analogous holding is had?

A. I have not any just in my mind at this minute and have not looked it up.

40. Did you ever in your experience go into Court in an assignment proceeding and get an advance order authorizing the assignee to employ counsel?

A. I never did.

42. Did you ever know it to be done?

346 A. I never did.

43. Have you read the decision of the Supreme Court in the case of Bradley, Smith & Co. *vs.* Williams, reported in the advance sheets of the Illinois Reporter of April 12th, 1899, at page 420?

A. I have not.

44. You understand the law to be generally that an assignee is personally liable to the attorneys he employs for their fees?

A. I so understand it unless there is a contract otherwise.

45. Unless there is a special contract between the assignee and attorneys?

A. That the estate shall be liable.

46. And that the assignee shall not be liable?

A. I think that is the law. I have not examined it but that is my judgment about it.

47. Did you ever hear of an order being entered in an assignment providing that the assignee should not be personally liable for his attorneys' fees but that the attorneys should look only to the estate?

A. I never did.

48. Suppose that out of extra precaution the attorneys went into Court in advance in an assignment proceeding and got an authority from the Court for the assignee to employ counsel in a certain proceeding. You do not understand that that order would in any way relieve the assignee from personal liability?

A. I would not think so.

49. You have read the case of Barker *vs.* Kunkel, in 10 Bradwell, have you not?

A. Yes sir.

50. Do you consider that correctly states the law of the
347 State?

A. I think substantially. I carefully examined it about a year ago in the argument of a case in the Appellate Court where the question of an assignment was involved and the question of fees.

51. And you think the law laid down in that Barker case as to an executor's liability is identical with that of an assignee's liability?

A. I think so and it is followed by the Appellate Court third District in the case of Jones *vs.* Spencer.

52. On what point was that case decided?

A. The question was about the allowance of certain fees against the assignee and I cited that Barker case as one of the authorities relied on and, if I remember right, the opinion of the Court in the Jones-Spencer case refers to that case. I will examine the 79th Ill. App. Perhaps it is in there. (Witness examining the book.) It is reported here in the 79th Ill. App. 349. I see that the Court does not refer to the Barker case but refers to other cases. I was thinking of another case.

53. This Barker *vs.* Kunkel opinion you refer to is a well reasoned opinion is it not in your judgment?

Objected to by defendant.

A. I think so.

54. And cited elaborate authorities?

Objected to by defendant.

A. Yes sir.

55. What is your opinion as to the law on this point where it is stated in that case, "It seems to be settled that an executor will not be allowed counsel fees for other services rendered at his instance unless he has paid them."

A. That I don't believe but the balance of the holding I concur in.

The practice in this State is with reference to attorneys' fees
348 of an administrator just like it is in regard to assignees.

The administrator employs his lawyer and the chances are that on final settlement he had the bill of the lawyer, and it is allowed and paid at the time and I think if he has made himself personally liable for fees that are reasonable and right it would be the duty of the Court to allow them, although he has not personally paid them.

56. Did you ever look up that question you are discussing?

Objected to by defendant.

A. No sir.

57. Have you read the Alabama case cited?

Objected to by the defendant.

A. No sir, I have not.

58. You have not read Williams on Executors?

A. No, I have it in my office but I have not read it.

59. There are a good many things done in the ordinary current practice of this State as matter of convenience where no objection is made which would not be sustained if objection were made and appeal taken.

A. I have no doubt there is some truth in that.

60. Therefore the practice in that particular you speak of would not in your opinion be decisive of the law of the State?

A. But I cannot understand the principle why if an administrator employs me and agrees to pay me a certain sum to perform certain duties for him as administrator so he becomes personally liable to me he should not be allowed that although he may not have personally paid it to me, but is personally liable for it, at the time he makes his final report.

61. That is your final opinion without looking up authorities?

349 A. Yes sir.

62. As I understand from your answers, if you were retained by an assignee, as stated in these hypothetical questions asked you, you would not consider it any part of your duty as an attorney to go into the County Court in advance and get an order authorizing the assignee to employ you as counsel?

A. Not as a duty but I might do it as an act of precaution under special employment as indicated by the question.

63. But you would not consider it your duty to do so?

A. No, I do not think it would change anything otherwise than as a precautionary measure I think it might do it.

64. You don't think it would change the duties or liabilities of the assignee?

A. I don't think it would.

65. It might simply make him feel a little better in his mind?

A. Yes, that is about all there is of it, but I think as a matter of precaution I would do it. I don't think it would change the law or the rights of the assignee if I did.

66. But you would not think you were derelict in your duty as an attorney if you failed to do it?

A. No, sir, not simply in failing to do that. The ground I am putting this action on is not upon that but upon the failure to have the necessary allowances made after the services had been performed.

(The signature of Thomas F. Tipton to the foregoing deposition is by agreement between the parties expressly waived.)

350 The said JOHN S. STEVENS being duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, deposes as follows:

Direct Examination by Mr. GATES:

Question 1. What is your name, age, occupation and residence?

A. John S. Stevens, 60, a lawyer by profession, Peoria, Illinois.

2. In what courts of Illinois have you practiced law?

A. In all the different courts.

3. How long have you practiced law in Illinois?

A. Since June, 1865.

4. Have you practiced in assignments under the Illinois Statute of assignments for the benefit of creditors?

A. To some extent.

5. Are you familiar with the law with respect to assignment proceedings under the Illinois Statute governing assignments for the benefit of creditors?

A. Somewhat so.

6. What in your opinion is the law of Illinois as to whether or not in a proceeding in assignment for the benefit of creditors, an order of the Court having jurisdiction thereof must be procured charging the trust estate with the expenses and attorneys' fees and other similar costs and charges in order that the assignee may be protected from personal liability or to reimburse him for such expenses?

A. An assignee is personally liable. If he wishes to be relieved of personal liability in the assignment he must procure an order of Court providing for the payment of any sums contracted to be paid by him out of the estate at sometime before the estate
351 passes from his hands.

7. Suppose that a corporation desires to make an assignment for the benefit of creditors pursuant to the statutes of Illinois controlling the same and desires that the assignment be made to a person named by it, and that the corporation goes to a firm of lawyers in the City of Chicago, Illinois, and states the object of its call and names the person to whom the assignment should be made and that the person to whom the assignment is to be made desires that the said attorneys act as the attorneys for the assignee when said assignment is made; and suppose that the said person is a layman and

a non-resident of the State of Illinois and has no knowledge of the laws of said State; and suppose that the said lawyers duly prepared and filed the deed of assignment and performed other valuable and proper services for the trust estate in their capacity at attorneys for the assignee; and suppose that the said attorneys were requested by the said assignee to procure any and all orders of Court which would be necessary to protect him from personal liability, or reimburse him, for their attorneys' fees and expenditures and costs and charges of administering the said estate; and suppose that the said attorneys fail and neglect to attempt and make no effort to procure an order of Court authorizing the assignee's employment of them as attorneys or reimbursing him for, or authorizing the expenditures and costs and charges of the assignee in administering the said estate, what is your opinion as to whether or not, under the law of Illinois, the said person so named as assignee would have a cause of action against the said attorneys for the attorneys' fees, costs and charges obliged to be paid by him by reason of said neglect and failure upon the part of said attorneys to attempt to procure said order or orders?

352 A. If they were negligent in the discharge of their duty toward him he would have a right of action for whatever damages immediately or approximately resulted from such negligence or wrong doing.

8. Assuming these same facts to be true, as in question 7, suppose that afterwards the said attorneys bring their action in assumpsit against the said assignee personally for their attorneys' fees and obtain a judgment therefor, you may state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued would have an election of remedies, viz., to either set up the said neglect by special plea or by way of recoupment in the suit brought by the attorneys or to permit a judgment to be taken by them and afterwards set up the said neglect and failure to procure said order or orders in an original action against said attorneys.

A. Under our practice recoupment lies as to any and all matters growing out of or directly connected with the original subject matter of the suit to the extent of the claim made, or you may file a plea of set-off, or you may allow the whole matter to be determined in a separate action of the defendant against the plaintiff or plaintiffs.

9. Assuming the same facts to be true as in Interrogatory 8 and assuming these additional facts, viz., suppose that the assignee's sale is ordered by the Court and that the attorneys for the assignee, without his consent, and in their own behalf, fraudulently by-bid, thereby preventing a sale of assets of said estate to a *bona fide* bidder out of which *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys' fees under order of Court, thereafter to be obtained, and suppose that afterwards the assignment proceedings are thrown out

353 of Court by consent in writing of the debtor and a majority in amount and number of the creditors of said corporation pursuant to the Illinois Statutes which was done in the absence of

the said assignee and without his knowledge but with full knowledge upon the part of his said attorneys and no funds were left in the hands of the Court from which the assignee could reimburse himself for the said attorneys' fees or expenditures, costs and charges in administering said estate, and before said assets were thrown out of Court the said attorneys fail and neglect to attempt to procure any order or orders protecting or reimbursing the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate, what is your opinion as to whether or not, under the law of Illinois, the said assignee in a suit brought against him personally by the said attorneys for their fees would have an election of remedies, viz., to set up said facts and failure upon the part of said attorneys to attempt to procure said order or orders by special plea or by way of recoupment or to permit a judgment to be taken against him and afterwards set up said matter in an original action brought by him against the said attorneys therefor.

A. He would have a right to an election.

Cross-Examination by Mr. Geo. Northrup, Jr.:

1. Did you ever know of an assignment proceeding where the attorneys for the assignee before they did any work for him went into the County Court and got an order in advance authorizing the assignee to employ them and providing that the assignee should not be personally liable for the fees but the fees should be simply and solely a charge on the estate?

A. No.

2. Did you ever know of a case in an assignment pro-
354 ceeding where the attorneys in advance of performing any services for the assignee went into Court and got an order authorizing the assignee to employ them?

A. No.

3. If an assignee should come into your office and retain you generally, as stated in your direct questions, to look after and do everything connected with an estate, would you consider it any part of your duty as an attorney to go into Court and get an order in advance of performing any services authorizing the assignee to employ you?

Objected to by defendant because the question does no- state the assumption of facts as stated in the direct interrogatories but assumes to do so.

A. No.

4. As a matter of fact, the Statute of this State referring to the assignment act provides: "That said Court" referring to the County Court, "may allow such omissions and allowances to said assignee or assignees in the final settlement as may be considered by the Court to be just and right." That is correct, is it not?

A. Yes sir.

5. As a matter of fact, the practice under that Statute is that the assignee in his account, preferably in his final account, presents to the Court a statement of the amount he has paid out for his attor-

neys' fees, counsel fees, expenses, etc. and asked the Court for an allowance of that amount to him as a credit in his account?

A. That is the usual practice.

6. And you consider that a proper practice do you not?

A. It is the practice I have always followed and that has been followed so far as I have been acquainted with assignment work in Court.

355 7. As a matter of fact, even assuming that the assignee or his attorneys should go into Court in advance before they have rendered any service and get an order directly authorizing the assignee to employ attorneys that would not in itself discharge the assignee from his personal liability to the attorneys for their services, would it?

A. An assignee, like a guardian or any officer of the kind, is liable for his contracts and he remains liable for his contracts until he is discharged in some way, either by payment, or by an authorization on the part of the Court allowing his contracts to be executed by payment of funds belonging to the estate.

8. And, even if he gets an authority from the Court to pay the expense he has run up unless he takes the money and pays those items he remains liable until he does so?

A. I do not understand he is discharged under any such circumstances until he has settled the account.

9. And paid the items?

A. And paid them or been relieved of them in some way by a settlement.

10. What I meant was this——interrupted.

A. I understand what you mean, but he might have a settlement without paying it in full.

11. Then substantially the rights of an assignee in this State with regard to attorneys' fees he has run up as assignee he has a right to be reimbursed from the estate for those services?

A. That is his right on proper showing to the Court to have them allowed and it is the custom of the Court in all such instances that is, with assignees—it is not the custom in guardianship matters—to allow reasonable attorneys' fees—at least, that has been the result of my practice and observation. It is not true of a guardian

356 though.

12. Suppose that such an assignee should come and retain you generally and should in the retainer request you to procure any and all orders of Court which should be necessary to protect him from personal liability and reimburse him for attorneys' fees and expenditures in costs and charges of administering the estate, would you consider under such a request that you were under any obligation to do anything more, other or different than to see when the proper time came that the assignee was reimbursed for the expenditures out of the estate?

A. I should consider it my business as an attorney and it would be of personal interest to me to see that the assignee did not part with the property until all of his expenses were provided for.

13. That would be particularly the case, would it not, if the as-

signee was a non-resident of this State, living in Indianapolis—under those circumstances, you would be particularly careful for your own protection to see that the estate was not thrown out of Court or proceedings discontinued until your fees had been taken care of, would you not?

A. I certainly would; it would not only be my duty to the assignee but it would be a matter of personal interest to me to see that the assets of the estate did not get away until everything was provided for that pertained to the Court proceedings in any way. That has been my custom always, before any final report was approved, to see that everything was in or ascertain, if possible, that everything was provided for.

14. Suppose that it were true that the attorneys were retained by an assignee and he requested them, as set out in the last direct question which you remember; and suppose they performed a
357 large amount of valuable services to the assignee but simply neglected to get the account allowed, but there were assets in the estate sufficient to pay all the expenses of the assignee and the assignee could have gone in himself and got them allowed or could have picked up any one of two or three thousand attorneys in Cook county and had the allowances made and could thereby have been reimbursed at very small trouble out of the estate, would you consider under such a state of facts as that, the mere fact that the original attorneys had not done this thing which the assignee could have done for him by any other attorney—that fact standing by itself—do you think it would constitute any cause of action?

Objected to by defendant as not cross examination; assuming additional facts other than called for in the direct questions and calls for the opinion of the witness on an assumption of facts which is not cross examination.

A. That would depend upon the question of negligence, as to whose negligence—if any one's—it was. If the attorneys were employed to take care of the assignee and he relied upon those attorneys and they were negligent and he was not aware of such negligence the attorneys would be liable for whatever result occurred from the negligence.

15. That is, they would have to show some actual damage?

A. Certainly.

16. And it is a principle of law is it not, that if one party breaks a contract the other party is bound to take any reasonable precaution to prevent increasing the damage to himself from that failure on the part of the party guilty of the breach of contract.

A. All within his knowledge and that could be accomplished with reasonable diligence and effort.

358 17. So that, if as a fact the original attorneys had neglected to get the order for reimbursement but the assignee knew before the estate was discontinued and the assets went out of Court that there was danger of its being discontinued and knew the attorneys had not gotten the order in question and were likely not to get it, he ought to have used reasonable means to see that the order was

gotten by himself or some other attorney before the estate was discontinued, ought he not?

Objected to by defendant same grounds as before.

A. That would depend upon the degree of reliance he placed in his original attorneys.

18. I was assuming he knew they were likely not to get such an order.

Objected to by defendant same grounds.

A. If he knew they were likely not to get such an order and he knew the law that he was personally liable in any event and he failed to secure an allowance, a reasonable allowance if any was to be made to the attorneys, it would be under such circumstances an act of negligence on his part for which he certainly could not hold the attorneys liable in damages to him. It would, however, as I say, all depend upon his knowledge of the law and of the necessities of the case to exempt him from liability, or the degree of confidence rather that he had in his original attorneys.

19. Referring to your answer to direct question 8, wherein you stated that you thought the assignee would have his election either to recoup this alleged cause of action for failure of his attorneys to get such an order in a suit of the attorneys for their fees, or to let judgment go there and bring it up in a separate action afterwards. I will ask you whether if as a matter of fact the assignee did
359 elect to litigate it by way of recoupment in the attorneys' suit for fees that would finally dispose of that question? And be *res adjudicate* as between the parties?

Objected to by defendant same grounds as before.

A. It would finally dispose of all questions that were actually litigated in that case; it would not necessarily dispose of his right to a separate action if the matters he might have recouped and shown by the evidence were not set up and litigated in that case. I do not mean plead but shown by the evidence.

20. In such a supposed case we will assume the attorneys are suing for fees under a *quantum meruit* on a general retainer, and the assignee pleads the general issue; in that case, under that state of the pleading, could the assignee, if he saw fit, set up the matter of neglect by way of recoupment under the pleadings in that case?

Objected to by defendant same grounds as before.

A. I think he would have a right to do so if he so elected.

21. And whether he did so or not would be determined by the question whether he offered evidence on that subject?

A. It would be determined by the record in the case.

22. And it would not be determined by the pleadings?

A. Not at all because there are no pleadings except the general issue which is simply a denial of the claim.

23. It would then be determined by the evidence offered on the trial? If on the trial the defendant went into that question and

offered evidence on that subject showing, or attempting to show, either by way of cross examination of the plaintiffs, or by affirmative evidence on his own behalf, that by reason of this neglect he was damaged because the services of the attorneys were of less value to him than they would have been, would you call that litigating
360 that question in that suit?

A. I would not want to say without seeing the record what was litigated in the suit. Certain evidence might be introduced for the purpose of diminishing the claim of the plaintiffs, or rather to lessen the claimed value of their services, and still might not estop the defendant from setting up in an independent action a claim for damages resulting from negligence. It would depend altogether upon the record in the case and I would not be willing to testify or rather to certify what I believed to be the law governing a particular case without seeing the record.

24. You are aware of the decision in the case of Powell *v.* Goodrich, in the 69th Ill.?

A. I think so.

25. In that case the evidence was that the defendant cross examined a physician in the original suit as to how the work was done and also offered some evidence in defense to the effect that the physician's services were rendered improperly—you remember the case?

A. Yes sir.

26. And the Supreme Court held there that matter was litigated in that proceeding?

A. Yes, in lessening the compensation to be paid the physician.

27. And likewise held that inasmuch as it was litigated in that case that way the defendant could not sue the physician afterwards for malpractice, but was estopped by that proceeding and the matter was *res adjudicate*?

A. Yes, I know the Court held that but I don't believe it is good law now.

28. That was the holding of the Supreme Court?

A. Yes, I know it was.

361 29. And you don't know of any holding to the contrary?

A. I don't remember of any now, but I still believe it is neither good law nor practice that where matters are simply brought out on the cross examination of a witness and where no claims of recoupment is actually made, no plea of set-off filed either, that it ought to be an estoppel of the right of the defendant to sue for decided negligence or positive wrongdoing. I doubt if the Court would sustain that decision now.

30. But so far as you know, that was the last expression of the Supreme Court on that subject?

A. Yes, so far as I now remember or have in mind.

31. And the point was squarely decided in that case, was it not?

A. I think so, but I would want to look at that question before I stated positively with reference to that. I know the case but I would want to look and see how it was presented before I attempted to answer your question.

32. In such a suit as that on a *quantum meruit* with the general issue filed by the defendant, the defendant has absolutely a right to show all these grounds of recoupment to the extent, if possible, of cutting the plaintiff's claim down to nothing, has he not?

A. He has that right, as I understand our practice.

33. And it does not make any difference if he did litigate that question, for the purpose of cutting the plaintiff's claim down to nothing, and failed, but the plaintiff's claim was reduced in the suit a portion of his claim, the plaintiffs recovering a large portion of their claim in that suit, would not that be *res adjudicate*, that an amount of the defendant's alleged claim of reduction had been disposed of by that judgment?

362 A. Well, it might only go to the extent of the actual value of the services without being in any way any affirmative claim by way of reduction.

34. I am asuming it was made as an affirmative claim by way of reduction?

A. If the question is litigated in a case and properly litigated there it is *res adjudicate*—there is no doubt about that.

35. In the case supposed, where there is a *quantum meruit* filed by the plaintiffs and general issue by the defendant, and the plaintiffs prove up their services and the defendant comes back and in his case simply put one witness on the stand on that subject, but with that witness went into the question as to whether or not the claim of the plaintiffs ought not to be reduced by reason of the negligence or failure of the plaintiffs in some respect, by going into that question with one witness he would be just as much barred by it as if he put a dozen witnesses on the stand on the subject, would he not?

Objected to by defendant same grounds as before.

A. That would depend altogether upon what the record shows as to the extent and character of the defense. The mere fact it was alluded to, or was touched upon, unless it was set up by way of affirmative defense would not bar a further right of action in an independent suit on the part of the defendant. It might be incidentally touched upon and not affect the rights at all except possibly by way of reduction of the value of the plaintiffs' services. A suit on a *quantum meruit*, of course, is a suit for the amount that is merited, or amount they are entitled to and proof has to be made of that. Now, any evidence that will tend to show the services were not worth as much as claimed would be legitimate and it would

363 not necessarily prevent a person from suing indepen-tly for wrongful acts or negligence. It would depend entirely on the record in that case and the record must show what was litigated. I think that is the rule, that where you rely upon a recoupment you can rely upon the record of the evidence in any other suit for the purpose of showing what was litigated in that case.

36. In the case supposed, where there is a *quantum meruit* filed by the plaintiffs and general issue by the defendant, and the plaintiffs prove up their services and the defendant comes back and in his case simply puts one witness on the stand on that subject, but with

that witness went into the *whole* question as to whether or not the claim of the plaintiffs ought not to be reduced by reason of the negligence or failure of the plaintiffs in some respect—by going into the question with one witness he would be just as much barred by it as if he put a dozen witnesses on the stand on the subject, would he not?

A. If the whole matter is litigated, whether by one witness or a dozen makes no difference, it is not a question as to the amount of evidence but the character of evidence introduced and the value of it.

37. Have you in mind any decision of the Supreme Court of this State upon which you base your conclusion that in the case supposed by direct question 8, the assignee in question would have an election of remedies, either to recoup in the suit by the attorneys for their fees, or let judgment go there and institute a subsequent action?

A. I base my answer entirely upon what is my general knowledge of the law and practice in this State, and I don't recollect any decision now upon that subject. I have several briefs on that subject, but I have not looked at them lately. I have been in quite

364 a number of cases of that kind in my practice.

38. Have you any knowledge of any decision of the Illinois Appellate Court upon that subject?

A. I have not any in mind now because I have not examined for the purpose of referring to any specific case, but my statements are based on my experience of thirty odd years of active practice in the Courts and the matter has arisen in my practice, I might say, many times over.

39. It is a fact, is it not, that a long list of decisions by the Supreme Court of this State lay down the principle that where judgment is rendered for the plaintiff such judgment sweeps away and disposes of any defense the defendant actually raised in a case, or which he might have raised under the pleadings?

A. No, not necessarily at law—any defense he might have raised—because he has his remedy, or he has his election of remedies in a certain class of cases such as we have been talking about. It is true if a party goes into chancery the complainant must set up all the causes of action upon which he relies of which he has knowledge, or of which he might have had knowledge, as the basis of his right to relief, but that is not true of every case at law.

JOHN S. STEVENS.

By agreement between the parties the deposition of Thomas F. Tipton as set forth in the foregoing depositions was taken at the law office of Messrs. Stevens Horton and Abbott, No. 300-308 Y. M. C. A. Building, Peoria, Illinois, on May 3, 1899, instead of at Bloomington, Illinois, on May 4, 1899, pursuant to the notice served on the plaintiffs for the taking of his deposition.

365 THE STATE OF ILLINOIS, *Peoria County, ss:*

I, Chas. P. Watson, a Notary Public within and for said County and State aforesaid, do hereby certify that the above Walter S. Hor-

ton, Thomas F. Tipton and John S. Stevens, were by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that their depositions were by agreement between the parties taken by me in shorthand and were afterwards reduced to writing by me and Miss Bessie Gipps, a disinterested person, in my presence and under my direction, that the said Jacob Newman, Geo. Northrup, Jr. and S. O. Levison, plaintiffs, attended by Geo. Northrup, Jr., their attorney and the said Harry B. Gates, defendant, attended by Edward E. Gates, his attorney, and said depositions were taken at the offices of Stevens, Horton & Abbott, Nos. 300-308, Y. M. C. A. Building, in the City of Peoria, in the County of Peoria, State of Illinois, on the 3rd day of May A. D. 1899, between the hours of 8 o'clock A. M. and 6 o'clock P. M. of said day.

In testimony whereof, I have hereunto set my hand and Notarial Seal, this the 6th day of May, A. D. 1899.

[SEAL.] CHAS. P. WATSON,
Notary Public, Peoria County, Illinois.

Notary and Stenographer's Fees.

To 1 day's work taking shorthand notes.....	$5.00
To 310 folios of testimony at 15¢.....	46.50
	51.50

366 STATE OF ILLINOIS, *County of Peoria, ss:*

I, Charles A. Rudel, Clerk of the County Court of the County and State aforesaid, do hereby certify that Chas. P. Watson is a Notary Public in and for said County duly qualified to [L. S.] act as such; that his term of office commenced on the 15th day of December in the year 1896 and will expire on the 15th day of December 1900 and that his signature above written is genuine.

Given under my hand and seal of the said County, at Peoria, on this 10th day of May, in the year of our Lord 1899.

CHAS. A. RUDEL, *Clerk*,
By JOHN A. WEST, *Deputy*.

Revenue Stamp.

367 JAMES M. CONDIT, a witness for the defendants, being first duly sworn, testified as follows:

Examination in chief.

Questions by Judge L. C. WALKER:

Q. State your name?
A. James M. Condit.
Q. You live in Chicago?
A. Yes sir.
Q. How long have you resided there?
A. I have lived in the vicinity of Chicago for about ten years.

Q. Do you know the parties to this suit?
A. I know some of them.
Q. Levinson and Newman and Northrup, the plaintiffs, and Harry B. Gates, the defendant?
A. Yes sir.
Q. You were present at the sale of the American Mortar Company at Waukegan?
A. Yes sir.
Q. You may state if you were a bidder there, and if so in connection with whom, if anybody?
A. I was a bidder in connection with Mr. Hussey.
Q. The Mr. Huss-y who was on the witness stand this afternoon?
A. Yes sir.
Q. You and he bid together, or were jointly interested in the bid.
A. Interested as partners.
Q. Do you remember about how much he bid up to?

368 Mr. KETCHAM: May the Court please, we object to that question for the reasons heretofore given.

The Court overruled the objection; to which ruling the plaintiffs by counsel at the time exceptec.

A. Yes sir.
Q. Do you remember about what he bid?

Mr. KETCHAM: May the Court please, the plaintiffs object to that question because it — immaterial, there was no sale, and no sale reported; and we object furthermore upon the same grounds we have already stated.

The Court overruled the objection, to which ruling, the plaintiffs, by counsel at the time excepted.

A. ThC last bid that he made, his firm bid, was between fifty-five and fifty-six hundred dollars.
Q. Who bid above him?
A. A Gentleman whom I didn't know.
Q. Did you learn his name there?
A. I think it was the firm of Howard and something—I forget the name.
Q. It was knocked off to that firm, was it?
A. Yes sir.
Q. When it was knocked off to that firm you may tell what either of them did, if you know, about going to the telephone.
A. Well, I was not prepared to bid as high as that, and I had some negotiations with the firm of Dickinson Brothers and King in Chicago, and they were going to take a part of this plant off my hands, and I went to the telephone——

369 Counsel for plaintiffs objected to the answer as not responsive to the question and moved the Court to strike out the same; and the Court sustained the motion.

Q. State whether you went to the telephone yourself in connection with your bid?
A. Yes sir.

Q. State whether or not you saw Howard and Birwin at the telephone?

A. Yes sir.

Q. I will ask you who they called up, if anybody?

A. I heard them ask for Mr. Newman.

Q. Did you, without stating what it was, after he had asked for Mr. Newman, hear a conversation going on on the part of the one at that end of the telephone?

A. Yes sir.

Q. I will ask you to state what it was?

Mr. KETCHAM: We are objecting to that, if your Honor please. We object to one side of a telephone conversation, that it cannot be evidence without supplying the other *wide*; that the limited conversation that takes place on one side of a telephone is only a part of the transaction and can only be material by reproducing the other *wide*. And we object for the further reason that the witness could not know and does not profess to know who was at the other end of the telephone, nor what was transpiring at the other end of the telephone; and the plaintiffs object for the further reason that what was said by anyone, whether a bidder or not, after
370 or away from the bidding itself, is not a part of the *res gestæ* and is mere declaration and hearsay evidence, and therefore it is not competent nor admissible against anyone.

Judge WALKER: I will withdraw the question.

Q. State whether or not after this gentleman, whatever his name was, Howard or Burroughs, left the telephone Mr. Levinson came to the phone?

A. Yes sir, he did.

Q. I will ask you what if anything, you heard from this gentleman at the phone before Mr. Levinson came in the way of saying "I will try to get him?"

Mr. KETCHAM: I am objecting to that.

Judge WALKER: I want, *amy* the Court please, If I can, to show by this witness that he said "I will try to get him," and thereupon he went out, and then Mr. Levinson came back.

Mr. KETCHAM: We submit, may the Court please, that that is not material or competent or relevant, what transpired between an individual and some one whom this witness supposed to be Mr. Newman or Mr. Northrup. We suggest without further argument that is not competent, and that he may have said "I will try to get him" adds nothing or subtracts nothing from what had gone before.

The COURT: I hardly think this is competent evidence.

Judge WALKER: The Court permits the fact to remain in, does it, that after he le*d*t Mr. Levinson came to the phone?

The COURT: There is no objection to that.

371 Q. I will ask you whether or not Mr. Levinson had bid before he went to the telephone?

A. No sir.

Q. I will ask *N*ou how soon, if at all, he did make a bid after he came back from the telephone room?

A. Immediately after.

Q. I will ask you if you remember how much he bid over you, if he did bid anything over you as soon as he arrived?

A. He did about a hundred dollars.

Q. I will ask you whether or not Mr. O'Brien was bidding at the second sale?

A. Yes sir.

Q. Before he quit bidding I will ask you to state what public announcement did he make in the hearing of the plaintiffs, or one of them? I mean after he quit bidding, at the time he quit bidding what public announcement did he make in the presence of the plaintiff in this case?

Mr. KETCHAM: May the Court please we are objecting to that, first, as incompetent, and second, as irrelevant and immaterial. Incompetent, because anything that he may have said in a general way is not binding upon these plaintiffs. Irrelevant and immaterial for the reason that if he had, for example, said, as we are led to infer from the opening statement, that he would not bid because Mr. Levinson or the plaintiffs were bidding, and that Mr. Levinson had no right to bid, that, as a legal proposition Mr. Levinson did have a right to bid and he had a right to cease bidding if he wanted to; but that it did not constitute any legal objection to his bidding if he said anything such as indicated by the opening statement
372 here, that it is claimed he did say. In other words, that it is entirely immaterial for any of the purposes of this case that Mr. O'Brien ceased to bid because he was not willing to bid against Mr. Levinson, or against the plaintiffs. And the plaintiffs object for the further and additional reason that it already appears from the evidence in this case, introduced by the defendant, that all of that matter was submitted to the Court in connection with the litigation that took place in the circuit court of Cook county, Illinois, and the judgment of the circuit court of Cook county, Illinois is final and conclusive upon that question, and to permit it to be retired or reheard in this case is to deny to the exemplification of the record of the Judicial Proceedings of the Circuit Court of Cook County the full faith and credit that under the Constitution of the United States they are entitled to have.

Judge WALKER: May the Court please, we want to show that Mr. O'Brien at this time challenged the right of these parties to bid at this time, and that they took the consequences and drove off a bidder.

The COURT: The objection will be sustained, it being proposed to prove that he simply said that the attorney for the assignee didn't have the right to bid.

To which ruling of the Court the defendant, by counsel, at the time excepted.

Q. I will ask you what, if anything, was said at that time,
373 after Mr. O'Brien had quit bidding, challenging the right of Mr. Levinson, as attorney for the assignee, to bid?

Counsel for plaintiffs objected to the question on the grounds and for the reasons heretofore stated.

Judge WALKER: Now, may the Court please, the defendant offers to prove by this witness that Mr. O'Brien challenged the right of Mr. Levinson to bid at that sale against them as he was the attorney for the assignee, and that he said on account thereof that he would not make any more bids, and that he did not.

The plaintiffs' objection being renewed, the Court sustained the same excluding the testimony offered; to which ruling, the defendant, by counsel, at the time excepted.

Judge WALKER: I make that offer with reference to both of the questions, and the Court sustains the objection to the offer, and the defendant excepts.

Q. I will ask you if you heard any conversation between Mr. Levinson and Mr. Gates after the sale, the day after the sale?

A. I do not remember it was the day after the sale or the day of the sale I heard some conversation between them.

Q. I will ask you what, if anything, Mr. Levinson said to Mr. Gates as to whether he had discharged him, or not, as his attorney?

A. Well, Mr. Levinson remarked to Mr. Gates, "Well, I
374 suppose I am discharged as your attorney."

Q. What did Mr. Gates reply?

A. Mr. Gates replied "I do not understand it that way; I think I have been abandoned by the attorney."

Q. Where were you when that conversation occurred, as you remember it?

A. Waukegan, in Whitney and Upton's office.

Q. After the sale?

A. Yes sir.

Cross-examination.

Questions by CHARLES MARTINDALE, Esq.:

Q. You were manager of the American Mortar Company?

A. Yes sir, or mis-manager, one or the other.

Q. At the time of its failure?

A. Yes sir.

Q. And you were a stockholder in the company?

A. Yes sir.

Q. And also a director?

A. No sir.

Q. Mr. A. B. Gates was also a stockholder?

A. Yes sir.

Q. And a director?

A. Yes sir.

Q. And president of the corporation?

A. Yes sir.

Judge WALKER: None of this is cross-examination, if the Court please. We object to it upon that ground.

Mr. MARTINDALE: It shows the relations of Mr. Condit
375 and will show when connected with the other testimoney which Mr. Condit will give, his relations to this property at the time he was there as a bidder, as he has testified here.

The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Q. Mr. A. B. Gates held a mortgage on the property of the corporation, did he not?

A. One or more, yes sir. I don't remember whether it was one or two or three.

Q. There was also a mortgage on the corporation to Howland and Condit, or Condit and Howland?

A. I think it was made to Howland, Woollen and Condit. There was three of us interested in it.

Q. At that time you were in business with Mr. Howland in this City? Condit and Howland?

A. Yes sir, I was interested with him.

Q. Mr. Howland is son-in-law of Mr. A. B. Gates, is he not?

A. Yes sir.

Q. The mortgages which were upon this property were placed upon the property within a day or two previous to your assignment, were they not?

Counsel for defendant objected to the question; and the Court sustained the objection.

Q. You purchased the mortgage from Mr. A. B. Gates and tye mortgage to Howland, Condit and Woollen, did you?

A. Mr. Hussey and I did.

Q. When did you purchase it?

376 A. Why, in April, just before the sale.

Q. How long previous to this sale?

A. Oh, I should think a week or so—I made an agreement to purchase it.

Q. You purchased it a week or so before this sale?

A. Yes sir.

Q. What was the date of the mortgage which you purchased?

A. I don't know.

Q. You don't know the date of it?

A. No sir.

Q. You purchased all of the mortgages, did you?

A. Yes sir.

Q. At the time you purchased these mortgages Mr. Harry Gates knew that you were purchasing them, did he not?

A. I don't know.

Q. He knew that you had immediately after you had purchased them, and before the sale he knew you had purchased them?

A. Before the sale he knew that I had purchased them.

Q. You had consulted with him at Whitney and Upton's office at the time you settled up the matter of the purchase of those mortgages, had you not?

A. I don't know that I consulted with him regarding those mortgages. I consulted with him at Whitney and Upton's office.

Q. At that time?

A. Before the sale.

Q. He (A. B. Gates) was present when Mr. Whitney and yourself

and Mr. Harry Gates were arranging the matter of the purchase of those mortgages, isn't that true?

A. I don't remember that Mr. Gates came to Chicago to close—that he came to Waukegan to close that mortgage deal.

Judge WALKER: May the Court please, I move to strike
377 out the above question and answer as not cross-examination.

The Court sustained the motion; to which ruling the plaintiffs by counsel at the time excepted.

Q. At the time when you purchased the mortgage of A. B. Gates and the other first mortgages upon this property, or at the time when the transaction was closed, it was understood and agreed between you, Mr. A. B. Gates, the assignee being present, that you would bid in the property at the sale, was it not, Mr. Condit?

Counsel for the defendant objected to the question as not proper cross-examination. The Court overruled the objection, to which ruling the defendant by counsel at the time excepted.

A. I cannot answer that. I don't remember of any such understanding in the presence of the assignee. My recollection is—I can't remember about that, but it seems to me I had an understanding with Mr. A. B. Gates, but I don't remember of the assignee being present.

Q. To refresh your recollection about that as to the time and place when you had that understanding with Mr. A. B. Gates, and especially with reference to the conversation which took place at the office of Whitney and Upton where you say Mr. H. B. Gates was present, the assignee, state if it was not then and there understood and agreed that you were to buy in this property at the assignee's sale.

Counsel for the defendant objected to the question on the ground that it involves a conclusion.

The Court overruled the objection; to which ruling the defendant by counsel at the time excepted.

378 A. I don't remember that H. B. Gates was present.

Q. Do you remember that he was not present?

A. No sir.

Q. Do you remember any conversation taking place before the sale, and at or about the time that you purchased these mortgages and concluded the agreement, at which Mr. H. B. Gates, the assignee, was present.

Judge WALKER: May the Court please, the defendant objects to that upon the ground that it is not proper cross-examination. I don't say that it would not be proper testimony, if the Court please, but we do say that it is not proper cross-examination.

The COURT: I suppose this is only preliminary to some other questions. The objection will be overruled.

To which ruling of the Court, the defendant by counsel at the time excepted.

A. Why, I had several conversations, I think, with Harry Gates

in Waukegan before the sale, but I don't remember of a conversation between Mr. A. B. Gates and myself when Harry Gates was present; and I don't remember that he was not present.

Q. Do you remember any conversation with Mr. Harry Gates, assignee, in relation to your purchasing the property at the sale of the assignee?

A. I do not remember any definite conversation with him.

Q. Do you remember any conversation on that subject?

A. I cannot tell what happened at any of these conversations.

Q. Either with him or with another party in his presence?

A. No sir, I cannot tell you what was said at any of those
379 conversations.

Q. Now, do you remember that you were examined as a witness in this case on deposition in January 1895?

A. Yes sir.

Q. At Chicago?

A. Yes sir.

Q. You have seen your deposition which you gave at that time since, haven't you?

A. I glanced over it. I have not read it.

Q. You have it in your hand here this afternoon, haven't you?

A. Yes sir.

Q. I will ask you if on that examination the following questions were asked you and if you did not answer them as follows: "Question. Why did you say that Harry Gates thought you would bid the property in at the sale? Answer. Well, I suppose he thought I would. Oh, Harry Gates was up here a day or two before the sale and of course he knew then I had bought the mortgages. We fixed it up in Upton's office at Waukegan. Question. Harry was present at the time. Answer. Yes. Question. It was understood at that time that you were to bid the property in at the assignee's sale in order to collect in all interest in order to get the entire title to the property? Answer. Yes, that was the understanding. Question. Did Harry represent his father in that interview in the lawyer's office in Waukegan? Answer. Yes." Do you remember that those questions were asked you and you made those answers?

A. I cannot say positively. Probably they were.

Q. And if you made those answers, state whether they were true?

A. They were true if I made them.

380 Q. Have you any recollection now as to whether they are true or not?

A. It is several years since I made that deposition and my recollection is not as good now as it was then regarding things that happened in 1892.

Q. This was in 1895 that this deposition was taken. Now, at the time you bought the mortgages and at the time you attended the sale you expected to be the only bidder there, did you not?

A. I dodn't know of any other bidder.

Q. Didn't you expect to be the only bidder and expect to buy in the property for about fifteen hundred dollars?

Counsel for defendant objected to the question as incompetent, irrelevant and immaterial and not proper cross examination.

The Court overrules the objection; to which ruling the defendant, by counsel, at the time excepted.

A. Well, I rather expected to be the only bidder there, yes.

Q. The question was whether you expected to bid it in for fifteen hundred dollars?

A. I had not decided on any exact figures. Somewhere in that neighborhood.

Q. Now, immediately after this sale, as mortgagee you took possession of this property, did you not?

A. Yes sir.

Q. And that was on the same day, was it not, of the sale?

A. Yes sir.

Q. As soon as you found that you had not got the property at the sale, you then proceeded to take posession of it as mortgagee
381 under the possession clause of your mortgage?

Counsel for defendant objected to the question as incompetent, irrelevant and immaterial and not proper cross examination.

The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

A. Yes sir.

Q. What, if any, conversation with regard to that had you with Harry B. Gates at that time?

A. None.

Q. None whatever?

A. I think not.

Q. You had no conversation whatever with Mr. Harry Gates in relation to taking possession of that plant?

A. I think not. Harry Gates went away from Chicago before I took possession of it.

Q. How did you take possession of the property?

Counsel for defendant objected to the question as not proper cross examination; and the Court sustained the objection.

Q. Where was the property located?

Counsel for defendant objected to the question as not proper cross examination; and the Court sustained the objection.

Q. You were present at the time when the assignment was discontinued, were you not?

382 Counsel for defendant objected to the question as not proper cross examination, and unless the plaintiffs wish to make Mr. Condit their own witness; and the Court sustained the objection

Q. I will ask you if you are down here on any other business than that connected with this trial?

A. I have other business, but I came at the request of Mr. Gates.

Re-examination.

Questions by Judge L. C. WALKER:

Q. You have told the truth about it, have you, if you did come at the request of Mr. Gates?
A. I think so.
Q. You were not expecting any bidders, you say?
A. I did not think there would be any.
Q. You were — expecting the attorneys for the assignee to bid independently either, were you?

Counsel for plaintiffs objected to the question and it was withdrawn by Judge Walker.

Q. You may state whether or not you were expecting the attorneys of the assignee to bid independently for themselves there against you?

Counsel for plaintiffs objected to the question for the reason that it is immaterial what the witness expected the attorneys to do.

A. No sir, I was not expecting that.

383 Q. You were not expecting, or were you, Birwin and Howard to bid against you and to telephone to the assignee's attorneys at the same time, were you?

Counsel for plaintiffs objected to the question as leading; and the Court sustained the objection.

Q. I will ask you to state whether or not you were expecting Howard and Birwin to bid on that plant?
A. No sir, I never knew them.
Q. Do you know those gentlemen?
A. I know them when I see them now.
Q. Did you know anything about their standing at the time they bid?
A. Not at the time they bid, no.
Q. You found out something about their standing pretty soon after the bid, did you?
A. Yes sir.
Q. What was it?

Counsel for plaintiffs objected to the question as not proper re-examination upon anything brought out on cross examination; and the Court sustained the objection.

Q. I will ask you what these gentlemen did after their bid, whether they put up their money or not and were able to comply?
A. No sir.
Q. How high did you say you bid on the first offer?
A. I do not recollect the exact amount; somewheres above two thousand dollars.

384 Q. On the first offer?
A. Yes sir.

Witness excused.

Whereupon the hour of five o'clock having arrived, the Court adjourned until tomorrow, Wednesday, December 6, 1899, at nine o'clock A. M.

WEDNESDAY, *December* 6, 1899—9 o'clock a. m.

Court met pursuant to adjournment.
Present, the same as on yesterday.
The hearing of the evidence was resumed as follows:

HARRY B. GATES, the defendant, examined in his own behalf, being first duly sworn, testified as follows:

Examination in chief:

Questions by Mr. DANIELS:

Q. State your name.
A. Harry B. Gates.
Q. You are the defendant in this case?
A. I am.
Q. Where do you live?
A. I live in Indianapolis.
Q. How long have you lived here?
A. About thirty years.
Q. Continuously?
A. Continuously.
Q. Do you know the plaintiffs in this case?
A. Yes sir, I do.
385 Q. All of them?
A. All of them.
Q. You remember when you first met them?
A. I do.
Q. When?
A. In November, 1892.
Q. Where did you meet them?
A. In their office in Chicago.
Q. In connection with what matter, if any, did you first meet them?
A. I met them in connection with the assignment of the American Mortar Company.
Q. Are you the Harry B. Gates to whom the deed of assignment of that company was made as trustee?
A. I am.
Q. If after you had met those gentlemen in their office you went up to the city of Waukegan with either of them on that day you may so state.
Q. I did; I went up with Solomon Levinson.
Q. And if after that day you were in Waukegan one or more times with Mr. Levinson or with any member of that firm you may so state.
A. I was up there with Mr. Levinson several times, probably three; it may have been four.

Q. If at any of those times, or if at any time you had any conversations with either of the plaintiffs with reference to the legal matters incident to the administration of the trust of the American Mortar Company, you may state the fact.

A. My conversation was mostly with Mr. Levinson.

Q. Did you have such conversations?

A. I had several conversations both at Waukegan and Chicago.

Q. I will ask you are you a lawyer?

386 A. No sir; I am not.

Q. Were you ever a lawyer?

A. No sir.

Q. Now, you say that Mr. Levinson and yourself went up to Waukegan on the morning of the day that the assignment was made to you by the American Mortar Company?

A. Yes, sir.

Q. What was the occasion of Mr. Levinson's trip to Waukegan at that time?

A. He went up to file the papers with the Clerk of the Court.

Q. What was the occasion of his going up on the later days in company with you?

A. There was some applications for the payment of the men employed on the tug and he went up to get an order of Court authorizing the payment.

Q. Went up to Waukegan?

A. To Waukegan, yes sir.

Q. What relation did he sustain to you in procuring those orders you have spoken of and going up to Waukegan? as you have heretofore been talking.

A. He went up as the attorney.

Q. As the attorney for yourself as assignee?

A. Yes sir.

Q. And for that trust?

A. Yes sir.

Q. Now, if at any time you ever said anything to him in that connection about representing you and looking out for the interests of the trust and your interest as trustee you may state the fact.

A. I had several talks with Mr. Levinson on that subject, I think the first one was at the time we had been up to Waukegan in reference to the procuring of the order paying off the employés on

387 the tug; I had had to advance some money at that time and I told him that I wanted him to look after my interests and see that I did not become personally liable in any way for claims of any kind.

Q. If at the time of the assignment, of the naming of the deed of assignment of the Mortar Company you were an officer and employé of the Company you may state that fact.

A. I was not in any way.

Q. If at that time you were a stockholder of the American Mortar Company you may state the fact.

A. I was not.

Q. If at that time you were a creditor of the American Mortar Company you may state the fact.

A. I was not.

Q. If as trustee under the deed of assignment of the American Mortar Company you offered the property of that company for sale at the City of Waukegan you may state the fact.

A. I did sir.

Q. Were you personally present?

A. I personally superintended the sale of the property.

Q. And cried the sale?

A. And cried the sale, yes sir.

Q. Do you remember any other persons who were present?

A. Yes sir, there was Mr. Hussey and Mr. Condit and Mr. Levinson and Mr. O'Brien and a couple of men from Chicago whom I didn't know who had met Mr. Levinson on their coming up from Chicago at the head of the hill coming up from the station, and quite a number of people that of course I was not acquainted with.

Q. Where was this sale cried by you?

A. On the steps of the Court House.

Q. In Waukegan?

388 A. In Waukegan.

Q. Do you remember what the bid was? The final bid for which the property was knocked off that day?

A. At the first sale?

Q. If there was more than one sale you may state the fact.

A. There was two sales.

At this point the examination of the witness was suspended in order to hear the testimony of the witness, John B. Cockrum.

JOHN B. COCKRUM, a witness for the defendant, being first duly sworn, testified as follows:

Examination in chief.

Questions by Judge LEWIS C. WALKER:

Q. State your name.

A. John B. Cockrum.

Q. You are an attorney at law?

A. Yes sir.

Q. Living in Indianapolis?

A. Yes sir.

Q. Have been here some years, have you?

A. Been in Indianapolis since 1889.

Q. What part of the law business are you engaged in?

A. Well, aside from having a little general practice, I am the general attorney of the Lake Erie & Western Railroad.

Q. Have you had some business in the State of Illinois?

A. Our railroad runs from the eastern line of Indiana to Peoria. I have had business in the counties of Ford, Vermillion,

389 Peoria and one or two others, I forget the names.

Q. Before you came to Indianapolis you lived in the southern part of this State?

A. Yes sir, I have been practicing law for twenty-one years.

Q. And had business over in Illinois at that time?

A. Not a great deal. I have some, yes sir, but not a great deal.

Q. Suppose it was shown in this case that the defendant was the assignee of the American Mortar Company, a corporation I believe, of Illinois—of Indiana—and doing business in Lake County, Illinois, where the property was situated; and suppose there had been fifty or sixty thousand dollars in money invested in the property, and I believe their business was in making mortar and working sand banks and that kind of thing, owning scows and tugs; and suppose the property was mortgaged to the amount, say, of eleven or twelve thousand dollars, and there was perhaps thirty thousand dollars in debts; and the company became insolvent and went into the hands of an assignee; suppose that the defendant, Mr. Gates, was the assignee and went to Chicago and employed an attorney there, and went from there to Lake county and was finally confirmed as assignee and took charge of the property and had possession of the property perhaps six months, say, from November 22nd to April, and during that time that he made several trips there and had to look after or guard the property and look after claims made against the scows, and had perhaps a half dozen or so consultations with his lawyers; and suppose that the property was finally offered for sale under an order of Court obtained by the attorneys for the assignee, and a sale was had of the equity, subject to the mortgages; and that there was a bid on the property and the property was bid off once for over five thousand dollars and the party didn't take
390 his bid; and it was offered again and finally sold for twenty-nine hundred dollars, and in that case the assignee's attorney was the purchaser, but not for the assignee and not for anybody that the assignee was interested in, or anybody connected with the company; that the bidder finally went into Court and showed that the mortgagees had taken possession of the property and the Court relieved him from his bid; and afterwards, under the laws of the State of Illinois, that the assignment was vacated by reason of the creditors taking the property into their possession under the mortgage, and that that proceeding was ended at the time; and he of course, gave bond, I believe, of twenty-five thousand dollars with some surety company. Now, I will ask you under the circumstances if you think you know enough of business of that kind to say whether or not you are able to give an opinion as to their value?

A. I think I am.

Q. I will ask you to state what in your opinion, would be a reasonable compensation for those services?

Mr. KETCHAM: To this question (the hypothetical question, as to the value of Mr. Gates' services as assignee), the plaintiffs object, for the reason that this witness has not shown himself competent to testify. This witness has said that he can give an opinion. I suppose *no*body can give an opinion. This witness has said that he practiced law in southern Indiana, but had nothing to do with business up in Illinois. Southern Indiana is a good ways off from Cook

County and from Lake County. He has said that he is the
391 general attorney of the Lake Erie and Western, and that the Lake Erie and Western Road runs through some of the counties in Illinois. Possibly the Court will take judicial notice that it does. Now, there is not anything in what this witness has said at all that would indicate that he has had the least modicum of experience in the matter concerning which he is to testify as an expert. This is a question for expert testimony, and it is not simply what the witness may say that he thinks he can give an opinion about.

The COURT: The witness says he is competent to testify as to the value of the services, that he has knowledge enough of such services. If he can testify as to the value of them he may answer the question. And then it is a question for the jury what weight, if any, is to be given to it. Otherwise he ought not to be permitted to testify. The objection will be overruled.

To which ruling of the Court, the plaintiffs, by counsel, at the time excepted.

A. If your honor please, I have had more or less experience with assignments and receiverships and settlements of that character, in Indiana and Illinois, as far as the objection made by Mr. Ketcham is concerned. We have people that owe the railroad—I have general supervision of all the litigation of the Lake Erie and Western Railroad and we have firms and corporations failing all along the line of the road that owe us, and I have to look after that kind of business as well as look after the stock claims and cow claims and see about hogs and so on; so that I feel that I am competent to tell what the services of an assignee under these circumstances are worth. My judgment is that six hundred dollars would be a very reasonable allowance.

392 Witness excused.

HARRY B. GATES, Examination-in-Chief resumed.

Questions by Mr. DANIELS:

Q. At the first sale that you have referred to, at what amount was the property knocked off?

Mr. KETCHAM: May the Court please, the plaintiffs object to the question on the ground that it is wholly irrelevant and immaterial as to what was offered at the first sale; that it is no criterion of what the property should have brought because it is not claimed that it went to the point of making a proper sale. An assignee's sale is only binding in the event it is confirmed by the Court. It is not binding upon the bidder unless certain steps are taken at the time, the bid accepted, a memorandum made in writing and signed by the person making the bid; and it is not possible to legally presume from the fact that a bid was made at a certain time that that bid if reported to the Court and approved by the Court under all the circumstances—and it is in evidence already in this case what was done with respect to the sale that took place that day—and the plaintiffs

object for the further and additional reason that it now appears affirmatively to the Court that the transaction that took place in and about that sale was submitted to the Court in the trial of the case of these plaintiffs against this defendant in the Circuit
393 Court of Cook County, Illinois, and that evidence was heard upon it; and it appears from the evidence of the lawyers of the defendant, the witnesses called by the defendant, that where that question was gone into upon a trial, whatever might be the law of Illinois upon the question of election of remedies, that where a trial is had and the evidence is gone into, that the election ceased and the judgment that has been rendered is a complete bar and adjudication upon that matter; and whatever may have been the condition on yesterday, when certain other questions were objected to, it is now certain upon the evidence of Mr. Horton and Mr. Stevens and Judge Upton that if an action is brought, and by way of recoupment, or defense of that action, that which might otherwise be the subject of an independent action is brought out in that case, whatever may have been the alleged rule in Illinois, or the rule as alleged in Illinois, as to the election of remedies, when that is once done that is the end of the matter, and it is adjudicated and it is apparent now therefore at this time that everything with reference to what took place at that sale was before the Circuit Court of Illinois at the time of the hearing that resulted in the judgment that is proved by the defendant in this case, and therefore that it is not only irrelevant and immaterial but that it is incompetent because, contrary to the provisions of the Constitution of the United States, it is sought to deny full faith and credit to the judgment that is before this Court in this case.

The COURT: It may be that you may go into what oc-
394 curred at the sale as part of the history of the entire transaction, but I do not see how that would have anything to do with showing the value of the assets.

Judge WALKER: We will withdraw the question, may the Court please.

Whereupon, the hour of twelve o'clock having arrived, the Court took recess until two o'clock P. M.

2 O'CLOCK P. M.

Court met pursuant to adjournment.
Present the same as before recess.

The examination of HARRY B. GATES was resumed as follows:

Questions by Mr. DANIELS:

Q. At the second sale that you have referred to, at what amount was the property knocked off?

Mr. KETCHAM: To this question, may the Court please, the plaintiffs object for the reason that it is irrelevant and immaterial under the issues joined in this case, and for the reason that it is wholly incompetent and inadmissible; that it is irrelevant and immaterial in that it affirmatively appears by the record which imparts also-

lute verity introduced in this case by the defendant to sustain the issue on his behalf, that the bid upon which the sale was made and the property knocked off was by the order of Court having jurisdiction in that behalf set aside and held for naught and the
395 sale vacated in a proceeding in which this defendant appeared personally and by his counsel other than the plaintiffs in this case. It further appearing from the records of the Court in Illinois that prior to that time the relation of counsel and client that had theretofore existed between the plaintiffs and this defendant had ceased; and that it is incompetent for the additional reason that it seeks to avoid the force and effect of the judgment of a Court of Record in Illinois, having competent jurisdiction, where it affirmatively appears from the evidence of the defendant that the identical issue sought to be made by an answer to this question had been tried and adjudicated and that upon the evidence already submitted by the defendant it appears beyond controversy that that precise issue was there adjudicated and determined; and upon the further evicence of the defendant it appears that whatever may be the rule as to a right to have an election, where an election had taken place and the litigation has been had upon the issue, there is no right thereafter to *may* any such election.

The COURT: The Court will overrule the objection and admit the evidence for any bearing that it may have on the value of the assets in the hands of the assignee.

To which ruling of the Court, the plaintiffs by counsel at the time excepted.

A. Twenty-nine hundred dollars.

The COURT: I think that is shown by the record, but then there is no objection made on that score, as I understand.

396 Q. If on the day of the sale referred to in the last question there was any conversation between you and Mr. Levinson respecting the relations of Mr. Levinson's firm to you as attorneys you may state the fact—the day of the sale or the day after.

A. I do not recall whether it was the day of the sale or the day after the sale.

Q. Was there such conversation?

A. There was, yes sir.

Q. You may state to the jury what that conversation was.

A. Mr. Levinson said to me "Have you discharged me as attorney?" and I stated "No," but it looked as if he might have abandoned me.

Q. Where was that conversation had?

A. I think it was in Whitney's and Upton's office in Waukegan.

By the COURT:

Q. What day was that do you say?

A. Either the day of the sale or the day after. I think it was the day after, possibly.

By Mr. DANIELS:

Q. Had you ever had any connection with any assignments under the Illinois statute prior to this deed of trust to you?

A. No sir, I had not.

Q. Had you had any knowledge of assignments under the Illinois statute prior to that time?

A. No sir.

Q. Had you any knowledge of the law of Illinois in relation to the duties and obligations of a trustee under a deed of assignment, under the law of Illinois?

397 A. No sir.

Mr. DANIELS: Now, may the Court please I will offer in evidence letter of March 29, 1893, from Newman & Northrup to Harry B. Gates; and the signature is admitted, I understand.

Mr. KETCHAM: Yes.

Mr. DANIELS: And the answer of Harry B. Gates to Messrs. Newman & Northrup to that letter dated March 30th, 1893; and the letter of Messrs. Newman and Northrup to Harry B. Gates of March 31st, 1893—the signature being admitted—and the answer of Harry B. Gates to that letter dated April 3rd, 1893, I offer these four letters in evidence.

The four several letters were admitted in evidence and marked, respectively, Exhibits Nos. 1, 2, 3 and 4, the same being as follows, to-wit:

EXHIBIT No. 1. W. S. G., Rep.

"CHICAGO, ILL., *March 29th*, 1893.

"Harry B. Gates, Esq., Care A. B. Gates & Co., Indianapolis, Ind.

DEAR SIR:—We beg leave to advise you that the assets of the American Mortar Company will be sold at the Court House in Waukegan on the 18th day of April at one o'clock P. M. We think it advisable that you should come up the day before.

Up to the present time we have not discussed with you the subject of fees. In view of the fact that the Estate will be speedily wound up we think some understanding ought to be reached by which

398 our fees are fixed and secured. Taking into consideration all the work we have done in this Estate we think we are fairly entitled to at least Two Thousand Dollars ($2000). We have also written to Messrs. Morris, Newberger & Curtis and kindly requested that this matter be adjusted before the sale.

Yours very truly, NEWMAN & NORTHRUP."

EXHIBIT No. 2. W. S. G., Rep.

"INDIANAPOLIS, IND., *March* 30, '93.

"Newman & Northrup, Chicago, Ill.

DEAR SIRS:—I am in receipt of yours of Mch. 28th, and noted. You state that your fees in the matter of the American Mortar Company will be 2000. Is this not an error of your stenographer, and, should be 200. Please advise me on this point by return mail.

Will be up on the 17th, if not before that date.

Yours truly, HARRY B. GATES.

Dictated by H. B. G.

399 EXHIBIT No. 3. W. S. G., Rep.

"CHICAGO, ILLINOIS, *March 31st*, '93.

"H. B. Gates, Esq., care of A. B. Gates & Co., 31 & 33 East Maryland St., Indianapolis, Ind.

DEAR SIR:—Your favor of March 30th in answer to ours of March 28th, in the matter of the American Mortar Company, at hand and contents noted.

The amount of Two Thousand Dollars ($2000) named in our letter is correct, and not an error of our stenographer.

Shall be pleased to see you on the 17th, as you suggest in your letter.

Yours very truly, NEWMAN & NORTHRUP.

N. Y.—I trust this matter will be adjusted before the 17th. Please see Capt. Curtis about it. He wrote us and we answered yesterday."

EXHIBIT No. 4. W. S. G., Rep.

"INDIANAPOLIS, IND., *April* 3, 1893.

"Newman & Northrup, Chicago, Ill.

DEAR SIRS:—I have yours of Mch. 31st, and noted. And, wish to state that there is no possibility of this matter being adjusted on basis of 2000.

Yours truly, HARRY B. GATES."

400 Cross-examination.

Questions by WILLIAM A. KETCHAM, Esq.:

Q. You said to your counsel that when you went to Chicago you were not an officer of the American Mortar Company.

A. No sir.

Q. You were not?

A. No sir.

Q. Not an employé

A. No.

Q. You were not?

A. No.

Q. Not a stockholder?

A. No sir.

Q. Not a creditor?

A. No sir.

Q. Who did you go to Chicago with?

A. Mr. A. B. Gates.

Q. Is Mr. A. B. Gates any relation of yours?

A. He is my father.

Q. You and he went together?

A. Yes sir.

Q. And went together on the same business?

A. Yes sir. Went together on the same business.
Q. Yes; didn't you?
A. I was going up to Waukegan.
Q. We haven't got to Waukegan yet.
A. I went to Chicago to go with him.
Q. You and he went together to Chicago on the same business?
A. Yes sir.
Q. And you went to the lawyer's office on the same business—that is the business of the American Mortar Company?
401 A. Yes sir, the assignment of the American Mortar Company.
Q. For the purpose of making an assignment?
A. Yes sir.
Q. And for the purpose of yourself becoming the assignee?
A. Yes sir.
Q. Your father was the officer?
A. He was.
Q. Was he an employé?
A. Well, I don't know whether you would call him an employé or not. He was not getting any salary that ever I heard of out of it.
Q. I am not talking about salary. Was he an employé?
A. He was an officer.
Q. He was an officer?
A. Yes sir.
Q. And he was a stockholder and he was a creditor.
A. Yes sir.
Q. He was a very large creditor, was he not?
A. That is, in addition to his ownership of stock?
Q. He was a large creditor, whether in addition to his ownership of stock or not.
A. Well, the stock, or money loaned?
Q. Both, we will put it them.
A. He had loaned them money, the company, considerable money.
Q. How much?
A. I do not remember the amount now. It was in the neighborhood, I should say, of probably ten thousand dollars or twelve thousand dollars.
Q. And he had a mortgage to secure that, did he?
A. Yes sir.
Q. How old was that mortgage?
A. I don't know.
402 Q. You don't know that it was made the day before?
A. I don't know.
Q. Or that it was not?
A. I don't know.
Q. In addition to that he was a large stockholder?
A. Yes sir. A pretty good sized stockholder.
Q. To what extent?
A. I don't remember the figure; I should judge somewhere in the neighborhood of twenty thousand dollars that he lost there; I don't recall just what the amount was.

Q. I am not asking what he lost; I am asking you to what extent he was a stockholder.

A. He was a stockholder to the extent of about twenty thousand dollars, I should say, or a little in excess of that.

Q. Were you and he in business together?

A. We were at that time.

Q. Partners?

A. Yes sir.

Q. Now, when you went up there, by way of refreshing your recollection, I will ask you if when you were at Newman's office it was not objected by one of the counsel, or an objection suggested against your being the assignee, among other grounds, that your father's mortgage had only been made the day before?

Judge WALKER: May the Court please, we object to that. It is not by way of refreshing his recollection on anything that we asked him in chief. It has nothing to do with the examination in chief at all.

The Court overruled the objection; to which ruling the plaintiff- by counsel at the time excepted.

403 A. It seems to me I remember that Mr. Newman had somebody in his office that he wanted to make assignee. That is my memory of it.

Q. Do you regard that as an answer to my question, Mr. Gates?

A. I think it is an answer to part of it.

Q. To what part of that question do you think that is an answer?

Objected to as not cross examination. The Court overruled the objection; to which ruling the plaintiff- by counsel at the time excepted.

Q. The question was if when you were at Newman's office it was not objected by one of the counsel, or an objection suggested against your being the assignee, among other grounds, that your father's mortgage had only been made the day before.

A. Mr. Northrup, or Mr. Newman rather, made some objection to my being made assignee; that he thought it would be better to have somebody there in the office assignee; that there might be some objections on the part of some of the creditors to my being a non-resident.

Q. Is that all the answer you can give to that question?

A. That is all the answer I can give.

Q. Dodn't Mr. Newman object, or suggest, that the fact that your father's mortgage had been only made the day before would be an objection in the way of your father's son acting as the assignee, and would complicate matters?

A. No, I don't think he did.

Q. Was there anything said by Mr. Newman to you at that conversation on the subject of the mortages, or mortgage, that had been made to your father in connection with an objection to your serving as assignee?

404 A. I do not recall that there was.

Q. Was there anything said by Mr. Newman at all on the subject of your father's mortgage?

A. No sir; I don't think there was. Not that I remember of.

Q. Was there anything said by Mr. Newman as to your relationship to your father and to the company, and his being a large creditor disqualifying you?

A. I don't remember of it.

Q. Nothing of that kind?

A. No sir.

Q. All that you remember then that took place in that conversation was that he suggested that your being a non-resident might be taken as a disqualification?

A. Well, that it would be better to have somebody there in the office.

Q. Was there anything said as to who in the office should be the assignee, or anything of that kind?

A. I do not know that there was, as they had decided before that they wanted me for assignee.

Q. These letters of the 29th and 30th and 31st of March and 3rd of April, are they the only correspondence that you had with Newman and Northrup on the score of fees?

A. It is all that I remember of.

Q. When and where did you first have any conversation with the firm of Newman and Northrup and Mr. Levinson on the score of fees?

A. I do not recall that we had any testimony other then——

Q. I am not talking about testimony.

A. I mean conversation, other than that—what he and I might have had going up and back to the plant, up at Waukegan.

Q. Then so far as anything as was said to the firm of Newman and Northrup on the score of fees, as you recall it, nothing
405 took place in the office of Newman and Northrup—that is no conversation.

A. Prior to the time of those letters?

Q. I will put it, up to the time of those letters.

A. No sir.

Q. Now, then, prior to the receipt of those letters how frequently did you discuss the subject of fees with any member of the firm of Newman and Northrup away from their office?

A. Well, I discussed the thing, I guess, several times with Mr. Levinson—I don't know how many times; I sup-ose maybe two or three, or four times.

Q. How frequently, how many conversations did you have if any on the subject of fees away from the office with any other member of the firm of Newman and Northrup, except Mr. Levinson, prior to this correspondence.

A. I was not—I had very little connection with anybody else but Levinson. I do not recall that prior to that time those letters were being written I had any discussion with any member of the firm about anything.

Q. I am asking you what conversation if any you had with any other member of the firm of Newman and Northrup, other than Mr. Levinson, during prior to this correspondence?

A. I said I had no talk with any of them.

Q. Except Mr. Levinson. Now, do you recall when you first had the conversation with Mr. Levinson on the subject?

A. What do I understand you to mean by fees?

Q. Don't you know what I mean by fees—lawyers' fees?

A. Well, there were other fees involved in the case; I didn't know whether you referred to all of them or not.

Q. I will get at the other fees afterwards. How frequently did you have any conversation with Mr. Levinson prior to this correspondence on the subject of lawyers' fees?

406 Q. I don't know there was anything said directly in reference to the word attorneys' fees.

Q. Was there anything said indirectly with reference to the word attorneys' fees?

A. Yes sir.

Q. Now, how frequently was anything said indirectly with Mr. evinson with respect to attorneys' fees?

A. Well, I think it was the time that Mr. Levinson and myself had gone up to Waukegan for the purpose of procuring an order to pay off the employes on the tug.

Q. Do you recall when that was?

A. I think it must have been the week following the assignment. It was the week following the assignment. There was a Sunday intervening between the assignment and the trip up to Waukegan from Chicago.

Q. Now, let me refresh your recollection. The assignment was made, I believe you said on the 22nd of November.

A. The 21st or 22nd; I do not recall the exact date.

Q. Now, I will refresh your recollection about the entry here on the 25th of November; "On reading and filing the petition of Harry B. Gates, assignee herein, it is ordered by the Court that said assignee may pay, and he is hereby authorized to pay the sum of about three hundred dollars to tug men and laborors on the tug H. S. Sill, belonging to said estate." Does that refresh your recollection that it was that order, at the time of the granting of that order that you had that conversation?

A. It might have been that order.

Q. Does it refresh your recollection as to whether that was the time—the 25th of November?

A. I cannot fix it down to any exact date now, Mr. Ketcham. That has been a good many years ago. It was on some of

407 our trips up and back together. We made several, three or four trips together.

Q. Was it on the first trip that you went up with respect to the tug?

A. I would not be sure that it was. We had several conversations.

Q. I know. I want to get one conversation at a time. What is your impression as to whether that was the time—the best impression that you have?

A. Well, it might have been that time. I cannot come closer than that.

Q. You have no impression then therefore at this time whether the first conversation that you had with him was upon the occasion

of your going up to see about the payment of the laborers on the tug, or whether it was not?

A. Well, it might not have been that trip.

Q. That I understand of course, but what I want to get at is if you have any impression about it at all.

A. I haven't any impression on that special trip, as to its being that special date.

Q. Let us see now when, without reference to the date, the time when you had the first conversation with Mr. Levinson at which the subject of attorneys' fees was mentioned, either directly or indirectly, and will you tell the jury without reference to the date when it was, and just that conversation was as near as you can recollect it?

A. Well, I asked Mr. Levinson a good many questions about the manner the thing should be conducted, what should be done and how it should be done; and most of our talk generally took place either going up on the trip or coming back; it was a thirty-five mile trip, and generally when we were there we were pretty busy, and when we got back we were pretty busy, but I think that on
408 the first or second trip that we went up together and back that I told him that I wanted to be sure that I was not held responsible for any debts, or anything, in reference to the American Mortar Company.

Q. So that as you now recall it the language you used was "Any debts, or anything"?

A. Well, of course a man cannot recall the exact words he used six or seven years ago, but I think Mr. Levinson fully understood that.

Q. I did not ask what Mr. Levinson understood, nor what you thought he understood. I am asking you what you said.

A. Well, I know I made it as forcible to him as I could.

Mr. KETCHAM: May the Court please I ask that that may be stricken out. I did not ask him how forcible he made it. I am simply asking him what he said.

The COURT: That may go out.

The WITNESS: I want to answer the question as near as I can.

Q. I want to know as nearly as you can give it what you said to him at the first conversation you had at which the subject of attorneys' fees was considered or discussed.

A. Well, that is as near the language I used as I can remember at this time.

Q. What?

A. That I wanted him to look after my interests and see that I was fully protected.

Q. Is that all?

A. That is as near as I can remember the conversation.

Q. Let us see if I have it right. All that you now recall that you said to him at the first conversation was that you wanted him
409 to see that your interests were protected.

A. I was not to be made responsible for anything.

Q. And that you were not to be made responsible for anything?

A. Yes sir, I was——

Q. You were what?

A. I was interested of course; I was paying out considerable money *without apparently any resources to get it back* and I was asking a good many questions on that score.

Q. Now at that time had he said anything to you on the score of attorneys' fees whatever at that time, at the time of that conversation?

A. I do not recall of his ever having said anything.

Q. At that time I mean—not at any other time.

A. I do not recall that he said anything.

Q. At that time had you said anything to him on the score of attorneys' fees?

A. In what way?

Q. In any way—had you named attorneys' fees to him at all in that conversation?

A. The word attorney fees?

Q. Yes.

A. I do not recall that I used the language "attorneys' fees."

Q. Don't you know that you didn't?

A. Well, I would not say that I did; I would not say that I didn't.

Q. I am asking you if you don't know that you didn't say anything about attorneys' fees?

A. No, I don't know it.

Q. Don't you know that he didn't say anything about attorneys' fees.

A. I am sure he never mentioned any amount of attorneys' fees.

Q. Don't you know that at that time he hadn't said any-
410 thing to you at all on the score of attorneys' fees?

A. I don't remember of his saying anything.

Q. That is as far as you can go? You don't remember that he said anything; you don't remember that you said anything; you are not prepared to say that you didn't or that he didn't say anything, but that you don't remember that either of you did say anything.

A. Directly.

Q. Or named the subject of attorneys' fees?

A. The word "Attorneys' fees," no sir.

Q. Now at that time you were discussing, were you not, that you had paid out some money?

A. Yes sir, I had, and I was going to pay out some more.

Q. You were going to pay out some on that tug, were you not?

A. If the conversation took place at that time we were.

Q. You were going up there with him with reference to paying out some money?

A. That is my memory of it.

Q. And you had already paid out some money?

A. Yes sir, some.

Q. And those matters had been discussed between you and him at that time, were they not—they were named?

A. Yes, we had discussed what was necessary; he had said before

I should pay it out we would go up and get an order of Court authorizing it.

Q. Now, after you had got through that, after you had discussed that in that connection, I will ask you if you did not say to him that you wanted him to see that you did not become personally liable for any claims?

A. No sir, I don't know that I used the word "claims." I simply spoke of it generally. I did not want——

Q. I did not ask you what you did not want. I asked you
411 if — used the word "claims"?

A. I do not recall that I did.

Q. You think you did not?

A. I think I did not.

Q. When you answered Mr. Daniels—if you did not use the word "claims" I will ask you how it was that you said to Mr. Daniels, or gave to him, or gave to the jury in answer to his question what you wanted, that you said to him that you wanted him "to look after my interests and see that I did not become personally liable for any claims." If you did not use the word "claims" why did you say that to Mr. Daniels then?

A. Well it might have been my poor way of expressing it, possibly.

Q. When you answered Mr. Daniels as to what you said you were attempting to give your recollection of that conversation as it was in your mind, were you not, and truthfully?

A. Yes sir.

Q. Now then, if you did not at any time in that conversation, use the word claims, why did you say to the jury in answer to Mr. Daniels that what you said to him was to see that you did not become liable for any claims?

A. Well, I don't know; as I say it might have been my way of expressing it.

Q. Now, to refresh your rec-llection by what you answered to Mr Daniels, let me ask you to say to the jury if you did not say to him that you wanted him to see that you did not become personally liable for any claims?

A. I would not say that I said that. Let us see what the shorthand reporter says the answer is.

Q. Is it your impression that you did not say this forenoon in answer to Mr. Daniels' question that you said to him, "I want
412 you to see that I do not become personally liable for any claims?" Is it your impression that you did not make that answer to Mr. Daniels?

A. You say it is so, and I presume I must have said it.

Q. I want to get at your recollection of what transpired this forenoon. Is it your recollection that you did not use that expression in answer to Mr. Daniels?

A. I haven't any impression on the subject.

Q. Now, when you were at that time going up on that trip to Waukegan with Mr. Northrup you were going up there with reference to claims on the tug, were you not?

A. I went up with Mr. Levinson.
Q. Mr. Levinson, I mean.
A. Yes sir, I think so.
Q. And it was with reference to the conversation that you had with him about those claims on the tug that you spoke to him about his seeing that you were not made personally liable for any claims?
A. How is that?
Q. And it was with reference to the conversation that you had with him about those claims on the tug that you spoke to him about his seeing that you were not made personally liable for any claims?
A. Why I don't know as I referred to that one claim. I meant the general business of the mortar company.
Q. I am not asking you what you meant.
A. Well, what I meant is what I refer to.
Q. Well, you had been conversing about the claims on the tug at the time when you said to him that you wanted him to see that you were not made personally liable for any claims.
A. We had discussed the busines in general discussion, and I presume we discussed that.
413 Q. That was the matter that w diately in hand, was it not?
A. Oh, no; there were other complicatio
Q. Were there other claims up there you were going up to see about?
A. I do not remember of any other claims at that time.
Q. Now, when and where was it that you had this conversation that you speak of with Mr. Levinson about his being discharged or his discharging himself, or abandoning the case—when was it and where was it?
A. Why, it was in Waukegan. I do not recall whether it was at the sale or the day after the sale, or whether it was after the sale took place and he deposited the check for part of the purchase money.
Q. I wish you would give us as near as you can recollect the time and place of that conversation—the best impression you have on the subject.
A. Well, my impression is that it was in Whitney's and Upton's office; and I know also that when Mr. Levinson went up there he always went to Newman and Northrup's office as I did with him.
Q. You mean Whitney and Upton?
A. Yes sir.
Q. Had you gone at this time to Whitney and Upton's office with Mr. Levinson?
A. I think Mr. Levinson and myself went into their office before and after the sale both.
Q. But this time, when you had the conversation with him?
A. Yes sir, I went there with him.
Q. Had you gone there together?
A. Yes sir.
Q. From what place did you go together?
414 A. From the hotel.
Q. How long after the sale was it?

A. Well, that's pretty hard to tell; that's getting it down pretty close for six years ago, Mr. Ketcham.

Q. That is what I want, as near as I can, to get it pretty close.

A. I would not say positively.

Q. Was it the day of the sale?

A. It was either the day of the sale or the day that Mr. Levinson and Mr. Jacob Newman came up to Waukegan when they paid the balance of the purchase money.

Q. That is the balance of the twenty-nine hundred dollars?

A. Yes sir.

Q. Which is your impression now? Is it your impression that it was the day of the sale or the day after the sale?

A. Well, I am not able to say.

Q. Have you any impression on the subject at all?

A. My impression is that it was either of those two days, and I do not believe I could get any closer.

Q. You have no impression on the subject as to whether it was the one or the other?

A. I am rather of the impression that it was the day of the sale, but I am not positive.

Q. Your impression is that it was on the day of the sale?

A. Yes sir.

Q. Was it before or after the sale?

A. Well, I am inclined to think it was after the sale, for the reason that up until that time Mr. Levinson and I had been on the very best of terms.

Q. And when this remark was made you were not on the very best of terms?

A. Well, I did not say we were not.

415 Q. The atmosphere had changed some?

A. It had changed some; we had had some words over that you know.

Q. Now, you say you went to Whitney and Upton's office together from the hotel?

A. Yes sir.

Q. How far is it from the hotel to Whitney and Upton's office?

A. I think it is just two squares; it may be a fraction over that, or a fraction under it.

Q. When you say you went together, you went out of the hotel at the same time and walked side by side and went to their office together, in company.

A. Yes sir; stopped and talked a little.

Q. Now, did you have any conversation on the way?

A. Yes sir, he was telling me—I asked him how I should bid the thing off, or rather how I should auctioneer it off.

Q. You were asking him?

A. Yes sir.

Q. After the sale?

A. No sir, this was before the sale.

Q. I understood you a moment ago that this was after the sale.

A. I thought you asked me where we went from the hotel.

Q. You said a moment ago that you went to Whitney and Upton's office with Mr. Levinson from the hotel.

A. I did from the hotel.

Q. At the time when you had this conversation?

A. No, I did not say that; at least, if I did, I did not understand your question.

Q. Then we will go back and see. Now, how did you and he get into Whitney and Upton's office at the time when you had this conversation?

416 A. Well, we must have gone there together; we generally did.

Q. Then you did go there together?

A. Yes sir.

Q. And this was after the sale?

A. That is my memory of it.

Q. Now where did you go there together from?

A. We must have gone from the Court House.

Q. Did you walk down to Whitney and Upton's office side by side?

A. No; I will tell you; I think we must have gone to the hotel first because Mr. Levinson and this man that had come up from Chicago to bid on the property at the first sale——

Q. You know I did not ask you "because."

A. I am just simply telling you why.

Q. But I didn't ask you why. I am asking you as to the facts.

Judge WALKER: Give the facts as you remember them.

The WITNESS: I think we must have gone from the hotel to the office.

Q. Now, the best of your recollection is that you went to the hotel from the sale and then you went from the hotel to Whitney and Upton's office on the day of the sale, and after the sale, and there it was that this conversation took place between you at which he asked you if you had discharged him and you said you thought he had abandoned the case; is that the best recollection you have?

A. That is the best recollection I have yes sir.

Q. Now, then, did you walk with him from the place where the sale was cried to the hotel?

A. I think I did.

Q. How far was that?

417 A. About a square and a half I should say, maybe two squares.

Q. Was there anybody else walking with you two, or where you two by yourselves?

A. I think there was this party that he had been looking for to come up from Chicago, was with us. I don't know what his name was, Berman or what.

Q. Was there any conversation between the three of you?

A. Why, I don't remember of anything that was said at the time.

Q. Then you went from the hotel to the office?

A. Of course we held some conversation, but what we said I do not remember.

Q. When you went from the hotel to the office, that distance of

two squares I understand you about, was there anybody with you there on that walk from the hotel to Whitney and Upton's office?

A. Why, Condit might have been with us; I don't remember that he was.

Q. And I might have been but I was not.

A. No, you might not.

Q. The question is not who might have been, but who was.

A. I do not recall anyone.

Q. So far as you recollect then, there was nobody except you and he?

A. No sir.

Q. And you walked down there to the office together, and did you have any conversation about your relation as attorneys on the way down to the office?

A. No sir.

Q. But that matter was postponed until you got to Whitney and Upton's office, and the Levinson said after you got to the office, "Well, how is that Mr. Gates; have you discharged me?"

418 And then you said: "No, I do not understand it that way; I think you have abandoned me." That is your understanding about it?

A. Yes sir.

Q. Then you went all the way down from the office, walking together, and not a word of that kind occurring until you got in the presence of the attorney?

A. Well, we evidently had gone there for something else.

Q. What had you gone there for?

A. I don't know; he had them employed up there; he had them doing work for the assignee; I don't know what we went there for now; I know we went there frequently.

Q. What did you go there for?

A. I presume I went there because he wanted me to go down there.

Q. Not what you presume. Have you any recollection?

A. I don't recollect that I went down there and wrote my name to any particular document or any thing; there were things come up; these people had been employed by Mr. Levinson; when he went there I also went there, but I always went there with him.

Q. Did you ever go to their office without him?

A. I do not recall. I think once, possibly twice, Mr. Levinson had me go up to Waukegan by myself, and told me to get Mr. Whitney and Mr. Upton to look after something that was to be done. I do not recall going there by myself.

Q. Did you ever go there after that time by yourself?

A. I do not think I was ever in Waukegan after night. Yes, I was, at the time when Mr. Levinson and Mr. Newman—the day the sale was confirmed we were all there in the office together.

Q. And were you not there at the time when the sale was

419 set aside?

A. That was the same day.

Q. That the sale was set aside?

A. Yes sir.

Q. Don't you know that the sale was set aside on the 26th day of April, and it had been confirmed before that time?

A. I do not recall that it was.

Q. Was not the sale confirmed the day after the sale?

A. If it was I was not there when the sale was confirmed. I know that the balance of the purchase money was paid the same day and my memory is the balance of the purchase money was paid the same day the sale was set aside.

Q. Had you on the day of the sale had any disagreement before you were at Whitney and Upton's office?

A. With Mr. Levinson?

Q. Yes sir.

A. I don't know that you would call it a disagreement. On that same day we hadn't anything except very pleasant relations. We had gone out to dinner the night before, or the day before at Chicago.

Q. I am not talking about what happened the day before down at Chicago, but on the day of the sale, at any time before this conversation took place, there was not any disagreement or any trouble between you at all?

A. None at all.

Q. You have been examined once before up in Chicago, were you not?

A. I was.

Q. Now, I will ask you if upon that examination, which took place on the 13th day of July, 1893—you were examined on the 13th of July, 1893, were you not?

A. In July; I do not recall the exact date.

420 Q. And that was when the matter was entirely fresh in your mind, was it not?

A. I judge a little fresher than it is now.

Q. A good deal fresher?

A. It was four or five years ago.

Q. I will ask you if this question was not asked you? "Question. Mr. Gates, the day after the sale, did you have a conversation again with reference to a discharge, upon the subject of the discharge of this firm? Answer, Yes sir." That question being asked you by Judge Olds, your lawyer on that occasion—he was your lawyer in that litigation?

A. Yes sir.

Q. I will ask you if you were not asked that question, and if you did not *and if you did not* answer "Yes sir"?

A. If that says so, I presume I did.

Q. I am asking for your recollection?

A. I don't recollect that.

Q. Do you think you were asked that question?

A. Oh, I presume I was asked that question.

Q. And I will ask you if you were asked this question by Judge Olds "Question. With Mr. Levinson?" and if to that you did not answer "The day after the sale Mr. Levinson came up by appointment to Waukegan to meet me regarding turning the property and paying the balance on the property, and having a confirmation of

the sale from the Jundge; and we did meet up in Whitney and Upton's law office, and Mr. Levinson and I had had a little disagreement the day before and we were not on very pleasant terms. Did you answer that question to Judge Olds in that way?

A. I presume I did. I know the unpleasant relations we had was at the sale?

421 Q. Then you did have unpleasant relations with him before this meeting at Whitney and Upton's office?

A. I said on the day of the sale we had.

Q. "Well, never mind that." You continued your answer, "Anyhow he brought up the subject." He says, "Gates, do I understand that you have discharged us as attorneys?" I said, "Most positively not, Mr. Levinson, I haven't discharged you." Did you make such an answer as that?

A. If the transcript says I did.

Q. I am asking you for your recollection.

Judge WALKER: Read the whole question and answer as it is there.

Mr. KETCHAM: I have read it all just as it is here. I never read anything other than it is, when I am interrogating a witness.

The WITNESS: I presume that is what I testified to.

Q. Have you any recollection about it?

A. Well, those are just about the circumstances, and I presume that I must have answered that way.

Q. Then this conversation—did you have the conversation twice with him?

A. No sir.

Q. About his being discharged?

A. Never but once.

Q. Now, that conversation then did take place, did it not, on the day after the sale?

A. Well, my memory may have been at fault then, as it may be at fault now. I cannot remember six years ago whether it was the day or the day after.

422 Q. Now, then, after that time, after that conversation took place on the day of the sale, or the day after the sale when he spoke about his discharge and you spoke about his discharging himself, or his having abandoned you—from that time forward did the firm of Newman and Northrup represent you in anything?

A. Well, was that at the time——

Judge WALKER: Do you mean, Mr. Ketcham, did they do anything, or do you mean for the witness to decide the question when their relation as attorneys and client ceased?

Mr. KETCHAM: I submit, may the Court please, that the question is a proper question, and can be answered, without explanation from the counsel—as to how it shall be answered.

The WITNESS: I will answer the question. I think they represented me.

Q. In what?

A. They had all my papers in the assignment case, still had them.

Q. In what did they represent you?
A. In the assignment.
Q. In what respect?
A. They were my attorneys.
Q. In what respect?
A. They kept all my papers; had all my papers and have them yet.
Q. But in what instance, in what matter did they at any time represent you, in any Court or out of any Court?
A. Well, I suppose the record of the Court would show that.
423 Q. I am asking you not what the record of any Court says.
A. I was not doing the law part of it.
Q. Have you any knowledge of any single thing that Newman and Northup represented you in, in Court or out of Court, after that conversation at Whitney and Upton's office?
A. Yes sir, they represented me before Clarke, Judge Clarke, I think his name was at the time they asked to be relieved from their bid.
Q. Did they represent you?
A. Yes sir.
Q. On the other hand don't you know that Whitney and Upton represented you at that time?
A. I do not know it.
Q. And you were objecting to their being released?
A. I objected to their being released?
Q. That you were objecting to their being released, and Whitney and Upton represented you, and that they did not represent you but represented themselves.
A. No sir, I did not so understand it. I think they were representing me.
Q. Were you there yourself?
A. I think I was.
Q. Who else was in Court?
A. Mr. Levinson and Jacob Newman.
Q. Who else?
A. Judge Clarke.
Q. Who else?
A. And Judge Whitney.
Q. Judge Whitney was there?
A. Yes sir.
Q. Who was Judge Whitney representing?
A. Newman and Northup.
424 Q. Whitney representing Newman and Northup?
A. Yes sir.
Q. Whitney was representing Newman — Northup in a proceeding against you, and Newman and Northup were representing you in a proceeding against themselves—is that your understanding?
A. No sir it is not. I never employed Whitney and Upton in my life.
Q. I am asking who they represented at that sale. Is it your understanding that at that proceeding, in which they were asking

an order upon you to return to them twenty nine hundred dollars that Newman and Northup were representing you and Whitney and Upton were representing them?

A. Yes sir.

Q. That is your understanding?

A. Yes sir.

Q. Well, what other times and in what other cases, or what other matter connected with this case, did they represent you?

A. Who?

Q. Newman and Northup.

A. After that?

Q. After that.

A. I don't know. They can tell better than I can.

Q. I am asking you.

A. I do not recall anything that I was present; I do not recall anything where I was present.

Q. Now, I will ask you if you don't know that on the very same day when Newman and Northup represented you before Judge Clarke, and Whitney and Upton represented them as against you before Judge Clarke, that they brought the suit against you on the very same day, the 26th of April, and you were served with process.

425 A. I knew that on that night.

Q. They sued you?

A. That night after I got down to Chicago.

Q. And got process on you that same day?

A. Yes sir, that night.

Q. Did you at any time after that go to the office of Newman and Northup from the time when you were sued?

A. I do not recall that I did.

Q. Did you ever write them a line?

A. I do not remember of it.

Q. Did you ever consult with them, either in their office or anywhere else?

A. If I did I do not remember it.

Q. Did you ever either directly or indirectly have any communication with Newman and Northup as your attorneys in any wise connected with this assignment after you were sued on the 26th of April?

A. I do not remember of it, if I did.

Q. Now, let us go back a little further, from the 19th of April, the day when as you say Newman and Northup represented you as against themselves and Whitney and Upton represented Newman and Northup as against you, had you any conversation or consultation with respect to any legal matter whatever, either in their office or out of their office, connected with this assignment?

A. That is after that day in Court?

Q. After that day.

A. Yes sir, I had some talk with both Newman and Northup down at the train that night.

Q. Consultation about this business?

A. About the American Mortar Company.

Q. What was the conversation?

426 A. Mr. Newman said—well, no*t* let's see what is it he said? I know he said something pretty mean—he said—I don't know either whether that was that night or not.

Q. I am asking that night at the train, whether mean or otherwise, what was it Mr. Newman or Mr. Levinson said to you when you were consulting with them abo*y*t the matters of that assignment?

A. I don't remember of anything that was said especially.

Q. Don't you know that after that nineteenth of April when they had got relieved from their bid and had got the money back, that you never consulted with them, you never corresponded with them, you never asked their opinion about anything and never asked them to do anything in connection with the assignment for you, and that they never did anything, nor never offered to do anything in connection with that after they got that money back on the 19th of April?

A. I do not remember of my having any.

Q. Now, when was the day of the sale? The 18th. Now, you had some conversation on the 19th, the day following the sale, at Whitney and Upton's office in which there was this difference of opinion that you speak of, Levinson wanting to know if he had been discharged and you saying No, you had not discharged him, but he had either discharged himself or had abandoned you; after that conversation did you at any time ever have any consultation, ever ask any legal opinion, ever ask anything to be done by Newman and Northup, or any of them, for you as your attorney- as assignee in connection with this Mortar Company, and if so when it was and where it was?

A. Well, the day the sale was set aside Mr. Newman and Levinson and myself went out to the works; it was out on the sand bar, possibly a mile or a mile and a half from the Court House, and we found these other people in possession of the factory, and

427 up to that time we had a watchman whom I was employing on the works, and we had some talk over the affair coming back, what ought to be done and what should be done and what could be done; we went from there immediately to the Judge's chamber.

Q. Now that was before the Judge had this hearing, was it not?

A. That was at the time he had it.

Q. It was before the visit to the plant out there—the visit to the plant out there was before, was it not? Didn't you go out there in order to turn over the possession, and didn't Newman and Northup, or Levinson, go out to take possession under their bid?

A. I presume they did, I don't know.

Q. That is what you went out for?

A. Yes sir.

Q. You went out to give them the possession?

A. Yes sir.

Q. And then you went back to the Court when you found you could not get possession and got this order set aside; is not that the fact?

A. I didn't. They did.
Q. Didn't you go back?
A. I went back with them, yes sir.
Q. You were there?
A. Yes sir.
Q. Now, this conversation that you speak of, when you went out to the works there was a conversation where you went out as assignee to turn over to them as purchaser- the property?
A. Yes sir.
Q. And they went out as purchasers to receive the possession from you? Did you understand that they were doing that, receiving that possession from you, as your attorney-?
428 A. As both I thought. They were my attorneys at that time.
Q. You understand they were doing that as your attorneys just as they were your attorne- representing you in the proceeding in Court that took place right at that time?
A. Yes sir.
Q. Now, what other transaction did you have with Newman or Northup, or either of them, than the time when you went out to give them the possession after the time when you had those words in the office of Whitney and Upton?
A. I don't remember anything after I had the conversation in the office of Whitney and Upton.
Q. What did you ever have to do with them as your attorneys—what did they do for you as attorneys from that time on except when you went out to deliver the possession and didn't deliver possession, and when you went into Court when they were asking to have the sale set aside?
A. I do not recall that I ever had any talk with them after that time.
Q. Don't you know that you didn't?
A. Well, we went down on the train together that night.
Q. I understand you were on the train. You saw them there at the Court House and all that. But did you ask them to do anything for you as your lawyers, or did they so far as you know represent you as your lawyer- in any matter after you had the controversy in the office the day following the sale?
A. Yes sir, they had my papers, always have had them, and have them yet.
Q. And that is the practicing law for you that they have done since that time is it?
A. Yes sir, they looked after that case right along, I guess, so far as I know.
Q. Now, didn't you go to Newman and Northup's office
429 on the day before the sale, the 17th?
A. Yes sir.
Q. And didn't you have some little friction there over the question of fees?
A. No sir, there was no friction. Everything that was said was in a pleasant way. There was no friction about it.

Q. Everything was in a pleasant way?

A. On my part.

Q. Just state what took place. Let the jury see whether there was any friction or not.

A. Well, when I came in I think I met Mr.—I think I met Mr. Newman first, and he spoke in a very laughing kind of a way and says: "How are you Mr. Two Hundred Dollar man?" And there was not much said then in the conversation in reference to the matter until we got down to eating lunch in one of the restaurants, Mr. Levinson and Mr. Newman and myself, and there may have been one of the clerks in the office, I do not recall it if there was, and he said that he wanted to know what I was going to do about his fee.

Q. Who did?

A. Mr. Newman, and I told him that—he said he would be satisfied with fifteen hundred dollars, and then he finally said he would be satisfied with thirteen hundred dollars, I think, I am not positive as to that; at least he said he would like to have me fix the fee and settle it. I told him that while I thought the amount of two thousand dollars was too much, still I would not stand in the way of any amount the Court might allow him.

Q. That is all the conversation that took place?

A. Yes sir.

Q. Now what was the friction that took place on the day of the sale that you spoke of?

430 A. I objected to Mr. Levinson——

Q. Not what you objected to. What did you say.

A. I told him that it looked to me right from the start—I said this to Mr. Levinson—that it looked right from the start as if he had been trying to make all the money he could out of the estate and get nothing for the creditors and he got mad at that and struck at me with an umbrella.

Q. That was the beginning of it, was it?

A. Yes sir.

Q. What had he done just before that time that led to your making that remark?

A. Well, these people——

Q. What had he done that led to the making of that remark?

Judge WALKER: Tell what was done.

Q. You answer my question; Judge Walker is not asking questions at all. What had he done?

A. Well, these fellows that he had brought up from Chicago, at least that I thought that he had brought up from Chicago——

Q. You are answering my question now—not what Judge Walker threw in—what had he done?

A. I don't see how I can answer your question. I certainly would not have said that if I had had no reason to say it.

Q. I am asking you what he had done.

A. I considered that he had done all——

Q. Not what you considered, not what you inferred that he had done; but what had he done, what had you seen that he had done, that led you to make that remark.

A. I saw these people that had met him just prior to the sale and that came up to the same, came up to attend the sale, and who had made a very large bid which they didn't have any money to
431 put up for, and I thought——

Q. I didn't ask you what you thought.

A. Well, I felt sure that he was responsible.

Q. That is what he had done, in answer to that question; and that is the best answer you can make. Mr. Gates, was it not your understanding when you went to that sale that Mr. Condit was to bid that property in for fifteen hundred dollars?

A. No sir, it was not.

Q. Or for any sum?

A. No sir, it was not.

Q. Had you any understanding that Mr. Condit had taken your father's mortgage- off his hands before he went to that sale?

A. I didn't have any understanding. I know he had bought them.

Q. How long before the sale had he bought them?

A. I don't know just how long. I know that he had been figuring on buying them for sometime before the sale.

Q. And that he had bought them?

A. Yes sir.

Q. And where was the transfer of this mortgage made to him? Were you present when the transfer was made?

A. No sir, I was not.

Q. Was not that made in Whitney and Upton's office in your presence?

A. No sir.

Q. When did you learn, and how did you learn that those mortgages had been transferred to Condit?

A. The day before the sale in Chicago Mr. Condit told me that he was going to telegraph A. B. Gates to come up, that he had some different document that he wanted to sign. What it was I didn't know.

Q. That was the day before the sale?

432 A. Yes sir.

Q. Condit told you that in Chicago?

A. Yes sir.

Q. Did your father come up then?

A. I think he came up, it may have been two days before the sale, Mr. Ketcham, I do not just recall. I know it was right about the time of the sale.

Q. Just immediately before the sale he told you that he was going to telegraph your father that there was some papers he wanted to sign?

A. Yes sir.

Q. And your father did come up?

A. Yes sir.

Q. And your father did then transfer those mortgages to Mr. Condit?

A. I don't know as to that.

Q. You understood that he had?

A. No sir, I had understood that he had already bought them, and the impression that I got from Mr. Condit was that there was some document that had not been properly executed.

Q. When did you first learn that your father had sold those to Mr. Condit?

A. I should think it was anyhow a week, or a few days prior to the——

Q. It was a few days prior to the sale?

A. It might have been a week.

Q. At any rate, it was after the time when the order for the sale had been made?

A. Oh, the order for the sale had been made some little time.

Q. The order for the sale had been made some time before that, and between the time of the making of the order *of* sale you learned that your father had transferred all his interest to Mr. Condit?

433 A. I understood that he had consummated a trade of some character or sale.

Q. Did you understand that Mr. Condit was to be a bidder on that sale?

A. Well, he said he would bid. I was anxious to get all the bidders I could.

Q. And he said he would bid?

A. Yes sir.

Q. You understood before he went there that he would bid?

A. Yes sir.

Q. And he did bid in point of fact?

A. Yes sir. I was anxious to get all the bidders I could.

Q. Did you have any conversation with Mr. Condit on the day before the sale about what he should bid in the event he became a bidder?

A. No sir, I did not.

Q. Or purchaser?

A. No sir, I did not.

Q. Didn't you, on the other hand, on the day before the sale talk with Mr. Condit about what he would do in regard to paying the fee of Newman and Northrup in the event he became the purchaser?

A. No sir, I do not recall any such conversation.

Q. Now, upon this same trial in the Circuit Court, if while you were being examined as a witness, the Court did not ask you the following question: "What was said about fees?" And if to that you didn't answer: "There was a little conversation before that. When I came in his office Mr. Newman said: "How are you Mr. Two Hundred Dollar Man?" Ans I says, "How are you Mr. Two Thousand Dollar Man?" Question. That was all that was said about fees? Answer. And Mr. Newman says to me, "Now, Gates, how about fees?" And I says, "Mr. Newman, I have nothing to do with

434 your fees whatever; I cannot make myself personally responsible for them, but anything the Court will allow I will not contest." Then when I came back to the office he says, "Is Condit going to buy in this property?" and I says, "Mr. Condit has bought

my father's mortgage." He says, "Have him secure me my fees before the sale takes place."

Judge WALKER: Who is "he?"

Q. (Continued:) "I says, "Mr. Condit has bought my father's mortgage." He says—that is Newman—I am reading it just as it is written—"He says: "Have him secure me my fees before the sale takes place." I says: "I have nothing to do with Mr. Condit." I went over to see Mr. Condit and he said he would have nothing to do about fees. I came away and reported to him about it. He said I should go again. I went over there and waited an hour or two, but he did not come back in time. I saw Mr. Levinson up at the sale. He says: "Why didn't you wait until morning?" I says: "We wanted to meet you and went up there about nine o'clock." Did you make that answer to the question by the Court on that trial?

A. Which part of it?

Q. The whole of it. Every word that I read, every single word, nothing taken out and nothing put in.

A. I don't know. There is something in there that does not sould like what I would say, but I suppose if they have got it down there I must have said it.

Q. Let me call your attention to a part of it. "And I says, "Mr. Condit has bought my father's mortgage"—this is in the conversation now with Mr. Newman that you answered to the Court.

435 *Court.*

A. That was my conversation with Mr. Newman on the day before the sale?

Q. "He"—that is Mr. Newman, by way of explanation—"He," Mr. Newman, "says have him," that is Mr. Condit, "secure me my fees before the sale takes place. I says I have nothing to do with Mr. Condit. I went over and saw Mr. Condit and he said he would have nothing to do about fees." Does that refresh your recollection that after you had had the conversation with Mr. Newman, after you had learned that your father had sold the mortgages to Mr. Condit, that you went to Mr. Condit and asked Mr. Condit if he would not pay or secure the fees of Newman and Northrup?

A. I evidently carried some message from Mr. Newman.

Q. What is there in this that has been read to you upon which you make the answer that you evidently carried over some message from Mr. Newman? What you said upon the former trial was: "I went over and saw Mr. Condit and he said he would have nothing to do about fees."

A. That is just exactly the message that Mr. Condit sent back.

Q. You did go over then and saw Mr. Condit to see if he would pay the attorneys' fees did you?

A. It seems according to that testimony that Mr. Newman had requested me to go over and see him about it, and I evidently did it. I do not recall it now.

Q. Now, with the exception of the conversation that you have given as having taken place with Mr. Levinson on the way up to Waukegan, did you have any other conversation with Mr. Levinson on the subject of attorneys' fees?

A. Well, in a general way we had a discussion of where the expense of the estate was to be gotten out. I asked him at another time, I think, if he felt confident that I was getting no responsi-
436 bility in the case; that I would get back all the money that I had paid out. I don't remember just what the conversation was, but I know in a general way we discussed it two or three times.

Q. Well, what brought up that conversation, and where was the conversation?

A. I don't believe I could locate it. It was either in his office, or to and from on the way to the plant, at Waukegan.

Q. You were going up to the plant, looking after the plant up there; and it was either in his office or at the plant, or on the way up, or on the way back.

A. Yes sir.

Q. That is to say, you never saw him except at one or the other of those places?

A. No sir.

Q. And therefore it was at once of those places?

A. Yes sir.

Q. Have you any recollection where it was?

A. I do not remember just where the spot was, no sir.

Q. Have you any recollection what circumstance it was that brought up that conversation?

A. I expect possibly getting the order of sale would have brought that up.

Q. Well, of course you may expect, and the Jury might expect something; but I want no*t* expectation about it. Have you any recollection about it?

A. I said that I do not recollect the exact time and place.

Q. We have got past the time. You don't recollect the place and you don't recollect the time. Now, do you recollect the circumstance that brought out that conversation?

A. I do not identify it with any particular circumstance.

Q. And you have no knowledge, no knowledge of any fact
437 that led up to that conversation, or that preceded that conversation?

A. Yes, I think the description Mr. Levinson gave me of another assignment case he had had brought it up.

Q. Just state what it was that brought that up; just what he said.

A. He said that he had had experience in another assignment cases. I remember discussing it, I do not remember the case; he told me of the times.

Q. Now, what did you say and what did he say at that conversation?

A. Why, I do not recall any particular conversation on the subject.

Q. Do you recall anything that took place at a conversation that was brought about by something that he said about an assignment that he had been connected with? Can you give to the Jury a single remark that you made or that he made? Did he say it was a cold day?

A. Well, he and I were up and back from there on some pretty cold days.

Q. Not what the fact was, but did you say it was a cold day?

A. I probably would have remarked it if it had been a cold day.

Q. Do you recollect having remarked it? Do you recollect having made any remark about the time of day? Can you give a single remark that you made or that he made at that conversation?

A. Yes sir, I think at one time he said he had——

Q. I am asking now about this conversation that was brought out by his reference to the assignment that he had had to do with?

A. Well, I would not say that it occurred just at this particular conversation.

438 Q. You do not recollect anything that happened at that conversation except that there was a conversation when he made some reference to an assignment that he had represented, and that is all you can tell the jury about that conversation?

A. I think it is.

Q. Now, then, go to any other conversation that you had on the score of fees and tell us when and where that conversation, not another conversation, took place.

A. I never made any memorandum of these things.

Q. I didn't ask you about a memorandum. I am asking you about your memory.

A. I remember the instance of discussing them very fully, but I don't remember anything in connection with it, what we might have discussed, whether it was cigars or any other matter foreign to the subject, I didn't burden my mind with it.

Q. I am not caring now particularly about the number of cigars, or anything else, that you took. I want to know if you have a recollection of a conversation with Mr. Levinson on the subject of attorneys' fees; and if so where it took place and when it took place, in addition to the one you gave when you went up there to Waukegan at the time you were looking after the tug.

A. Well, if I had kept a diary I might have had exact dates when it occurred and where it occurred, but I did not do it.

Q. I am not asking you whether you kept a diary or not. I am asking you if you have any memory at all about it.

A. I have a pretty good memory, yes sir.

Q. About any conversation?

A. I don't remember of any other matter we were discussing, no sir.

Q. Can you tell the Jury any time or place when you had a conversation with Mr. Levinson on the score of attorneys' fees?

439 A. I don't remember of any other time.

Re-examination.

Questions by Judge WALKER:

Q. I will ask you, after the sale was set aside, if there were any assets left in your hands?

A. No sir there was not.

Q. Did you know when it was finally taken out of your hands?
A. No sir, I did not.
Q. But it left nothing in your hands?
A. No sir.

Recross-examination.

Questions by Mr. KETCHAM:

Q. You did know that before the sale had been set aside Condit, who had got the mortgage from your father, had gone into possession and was in possession of all the physical property of which you had been the assignee, and denied to you as assignee the right to deliver that possession upon that sale, didn't he?
A. I didn't know that it was Mr. Condit; I didn't know who it was; I simply knew that it was some strange man in possession when I got down there.
Q. He denied your right to possession and delivery?
A. Yes sir.
Q. He didn't tell you who, and you didn't inquire?
A. No sir.
Q. You had made no inquiry about it?
A. The party would not hardly let us in the door; would hardly let us on the ground.
Q. You didn't know that that was Mr. Condit?
440 A. I didn't know; I thought it might be, but I didn't know.
Q. Condit was an old acquaintance of yours down here?
A. Oh yes, I knew him down here.
Q. You knew him very well, here and there.
A. I didn't know him so well there.
Q. He was a partner in business, was he not with Mr. Hewitt Howland, your brother-in-law?
A. Yes sir, he was. I knew him very well down here; used to buy goods of him.
Q. You knew him in Chicago and knew him in Waukegan?
A. I did not until after I came into the thing, being assignee of the American Mortar Company. I never saw him much until I was assignee again.
Q. Then you never saw him much up there?
A. No sir.
Q. But after you became assignee you knew—you knew all the time that he had been the manager up there?
A. Oh yes, sir, I knew that; I had heard that he had been.
Q. You knew that he was interested?
A. Yes sir.
Q. You knew he had bought your father's interest there?
A. Yes sir.
Q. And you knew that he was bidding at the sale?
A. I did not know that he was bidding at the first sale. I thought it was Hussey bidding. I was not sure that it was Jim himself, and

I knew that Hussey was bidding; yet I thought he and Condit were together.

Q. That was in your mind?

A. Yes sir, that was in my mind.

Q. And then you understood at that time they held all the mortgages, didn't you, substantially?

A. No sir. I didn't know of any other mortgage they held
441 except my father's.

Q. Did you inquire whether they held any others?

A. I never asked them.

Q. Then you knew that somebody somehow or other had got into possession?

A. Yes sir.

Q. And you had it in your mind that it was Condit, but——

A. I just supposed it was.

Q. You just suspected it was Condit?

A. I didn't suspect; I just thought it was.

Witness excused.

Whereupon the defendant rests; and the plaintiffs to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

Mr. MARTINDALE: May the Court please, on behalf of the Plaintiffs, I will now read in evidence the depositions of Edward Judd and others, taken in this case: Depositions of Edward J. Judd, Frank H. Scott, John C. Mathis and Horace K. Tenney.

Mr. DANIELS: May the Court please, the defendant objects to and moves to strike out and suppress Interrogatory No. 10 and the answer thereto in the deposition of Edward J. Judd for the reason that the declaration, answer, written pleadings and the papers in the case are the best evidence of what the plaintiffs were suing for in the action in Cook County referred to in the question.

442 The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Mr. DANIELS: The defendant objects to and moves to strike out Interrogatory No. 11 and the answer thereto in the deposition of Edward J. Judd, for the reason that the declarations, answer, written pleadings and other papers in the case as to whether the defendant set up any defense to plaintiffs' claim in the action referred to in the question.

The Court overruled the objection, to which ruling, the defendant, by counsel, at the time, excepted.

Mr. DANIELS: And the defendant moves to suppress and strike out Interrogatory No. 12 and the answer thereto in the deposition of Edward J. Judd, for the reasons last stated and because the transcript of the Evidence is the best evidence as to what evidence was introduced in that cause and in what manner the defenses were made.

The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Mr. DANIELS: And the defendant moves to strike out and suppress

Interrogatory No. 14 and the answer thereto in the deposition of Edward J. Judd, for the reason that the question calls for a conclusion of the witness as to what the effect or substance of the arguments were, and does not call for the actual statements made; and for the further reason that it is incompetent, irrelevant and immaterial as to what basis or argument was made by Judge Olds, and for
443 the reason that there is no showing that the arguments made by Judge Olds were proper and relevant and within the issues joined in that case in that particular trial in the Cook county Circuit Court. And for the reason that if it were shown that the arguments made were within the issues joined it is not further shown that Judge Olds was discussing the actual evidence introduced in said Circuit Court. And for the further reason that Judge Olds may have been mistaken as to the actual facts in that case and as to their bearing upon the issues joined.

The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Mr. DANIELS: And the defendant moves to suppress and strike out Interrogatory No. 17 and the answer thereto in the deposition of Edward J. Judd for the reason that the decision actually rendered by said Court in rendering a judgment in said Circuit Court of Cook County against the defendant in that suit is the best and only evidence of what was actually done in said case, and the decision rendered under the issues joined under the law of Illinois is all that is binding and conclusive upon the parties thereto. As to what the Judge may have said or may have not said in delivering such decision could have no bearing upon what was actually decided in said case. Said question is also incompetent for the reason that it elicits an answer which would express a conclusion of the witness and not what was actually said or done.

The Court overruled the objection, to which ruling the defendant by counsel, at the time, excepted.

444 Mr. DANIELS: Now, may the Court please, in the deposition of Horace K. Tenney, the defendant moves to suppress and strike out the following clause contained in the answer to Interrogatory No. 14, propounded to Horace K. Tenney, to-wit: "I wish to state, however, that in my judgment, under the law of Illinois, the facts would not create any claim in favor of the assignee and against the attorneys," for the reason that the said clause of said answer is not responsive to the question propounded, and is wholly incompetent, irrelevant and immaterial.

The Court sustained the motion; to which ruling the plaintiff, by counsel, at the time excepted.

Whereupon the said depositions of Edward J. Judd, Frank H. Scott, John C. Mathis and Horace K. Tenney, except as to the clause in the answer to Interrogatory No. 14 suppressed on motion by the Court, were admitted and read in evidence, the same being in the words and figures following; to-wit:

445 STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Complaint No. 46,388. Room No. 1.

Depositions of Edward J. Judd, Simeon P. Shope, Frank H. Scott, John C. Mathis and Horace K. Tenney, witnesses produced and sworn by me, Wilson E. McDermut, a Notary Public in and for the County of Cook and State of Illinois, at the office of Newman, Northrup & Levinson, in the Chamber of Commerce Building, in the City of Chicago, County of Cook and State of Illinois, commencing on the 21st day of August, A. D. 1899, at the hour of 11 o'clock A. M., and from day to day thereafter, at the several times stated in said depositions, pursuant to the enclosed notice, which is hereto attached and made a part hereof, these depositions being taken on the part of said plaintiffs in a certain action now pending in the Superior Court of Marion County, in the State of Indiana, wherein Jacob Newman, George W. Northrup, Jr., and S. O. Levison are plaintiffs, and Harry B. Gates is defendant.

On Monday, August 21st, 1899, at the hour of eleven o'clock A. M., at the office of Newman, Northrup & Levison, in the Chamber of Commerce Building, Chicago, Cook County, Illinois, the said EDWARD J. JUDD, being first duly sworn by me to testify the truth, the whole truth and nothing but the truth relating to said
446 cause, testified and deposed as follows:

Direct Examination by G. W. NORTHRUP, JR.:

Interrogatory 1. Please state your name, age, residence and occupation?

Answer. Edward J. Judd. Forty-one years of age. Reside in Chicago, Cook county, Illinois, and am a practicing attorney.

At this point the further taking of these depositions was continued by me until Tuesday, August 22, 1899, at 10 o'clock A. M. at the same place.

The further taking of the deposition of Edward J. Judd was resumed on Tuesday, August 22, 1899, at 10 o'clock A. M. at the same place, pursuant to continuance.

Whereupon said witness EDWARD J. JUDD was further examined by Mr. Northrup and testified as follows:

Interrogatory 2. How long have you been engaged in the practice of law, and where?

A. I was admitted to the bar in June, 1880, and practiced until

February, 1883, in Rock Island County, Illinois, and since the last named time in Chicago.

Int. 3. Please state whether or not you remember a suit in the Circuit Court of Cook County, Illinois, in which Jacob Newman, George W. Northrup, Jr. and S. O. Levison were plaintiffs, and Harry B. Gates was defendant, which was tried in the month of July, 1893?

A. I do.

447 Int. 4. Please state briefly what, if any connection you had with that litigation?

A. I tried it as attorney for the plaintiffs.

Int. 5. Please state where this trial that you refer to took place?

A. At the Court House in Chicago, Cook County, Illinois, before Judge Frank Baker, of the Circuit Court. It was tried by Judge Baker without a jury.

Int. 6. Please state who acted as attorney for the plaintiffs in that case on this trial, and conducted the plaintiffs' case?

A. I did.

Int. 7. Please state whether or not Harry B. Gates was present at that trial?

A. He was, and was a witness.

Int. 8. Please state whether he had any attorney representing him in that trial, and if so whom?

A. He was represented by Judge Walter Olds, formerly of the Supreme Court of Indiana.

Int. 9. About how long a time was occupied by the trial?

A. A day, is my present recollection.

Int. 10. Please state briefly what was the nature of the suit; that is, what the plaintiffs were suing for?

A. The plaintiffs were suing for compensation for services, counsel and advice as attorneys, rendered by them to the defenda-t in connection with the failure and assignment for benefit of creditors of the American Mortar Company.

Int. 11. Please state whether or not the defendant, Harry B. Gates, or his counsel, Judge Olds, set up or attempted to set up any defense to the plaintiffs' claims on this trial?

A. They did.

Int. 12. Please state how or in what manner these defenses were made at this trial.

A. By the introduction of evidence in behalf of the defendant and by the presentation of argument of the defendant's side

448 of the case to the Court by his attorney, Judge Olds.

Int. 13. Please state briefly the substance of the arguments made by Jude Olds to which you have referred.

A. Judge Olds first contended that on the evidence there was shown no person- liability whatever on the part of Harry B. Gates, because he claimed he had no- employed the plaintiffs personally but in his official capacity as assignee. He next disputed the value of the services of the plaintiffs as shown by the evidence, and offered evidence upon that question, and argued to that effect. He furthermore argued, from the evidence offered by the defendant, that the plaintiffs had, at the time of a sale which took place in the assign-

ment proceedings, deserted the interests of the defendant and done acts which were positively injurious to the interests of the defendant, and he argued that the injury thus caused by the acts of the plaintiffs would more than offset the value of any legal services that they had previously rendered.

Int. 14. Please state, if you can, what was the substance of the argument made by Judge Olds to the Court touching the last matters to which you have referred?

A. Judge Olds claimed that it appeared from the evidence that in the assignment proceedings the assignee held a sale at Waukegan, Illinois, of certain assets and property of the insolvent, The American Mortar Company, Harry B. Gates being such assignee; that S. O. Levinson, one of the plaintiffs, was present as attorney at such sale; that at such sale certain bidding was done and the property knocked off to the highest bidder; that such highest bidder had not sufficient money to make good his bid, and under the circumstances the assignee, acting under the advice of Levinson, rejected the bid and re-offered the property for sale; that when the property
449 was re-offered for sale Levinson bid on the same; and the same was knocked down to him at a much smaller figure than had been previously offered by the person who had failed to make good his bid. He further argued that it was shown by the evidence that there was another bidder present who, because the property was re-offered for sale and Levinson, the attorney, bid on it, was deterred from bidding, and that by such conduct Levinson spoiled a good sale of the property, and the loss thus occasioned should be set off against any claim for services previously rendered.

Int. 15. Please state whether or not you were present during the entire time that this trial was going on?

A. I was, from the time it began until the Judge rendered his opinion and entered judgment.

Int. 16. I will ask you whether or not, at the close of the trial Judge Baker, who was trying the case, rendered any opinion?

A. He stated his reasons for rendering his decision orally.

Int. 17. Please state in your own way the substance of what the Judge said in rendering his opinion in the case.

A. In delivering his opinion the Judge analysed the evidence and found the value of the services rendered to be $1300. He said that under the evidence Harry B. Gates had employed the plaintiffs and was liable personally for the services rendered. As to the defense that the conduct of Levinson at the sale was improper and an injury to the defendant, the Court said that he considered the conduct of Levinson, in advising against the acceptance of a bid where the bidder could not pay a proper proportionate earnest money, perfectly proper; that as to the fact of Levinson bidding when the property was re-offered, such act was not improper from the mere fact of his being an attorney connected with the case, but on the con-
450 trary in this case was most decidedly proper, in that it tended to prevent a sacrifice of the assets of the estate, and that the primary duty of Levinson was to look after the interests of the estate, since that was the very purpose for which Gates hired him. He

said, it appearing that these proceedings were finally dismissed, no man could tell from the evidence what really would have been the consequences of Levinson's conduct, but it did appear that the plaintiffs rendered the services and that the acts that the defendant complained of as misconduct were not misconduct.

(Signed) EDWARD J. JUDD.

Subscribed and sworn to before me this 31st day of August, 1899.

(Signed) WILSON E. McDERMUT,

[NOTARIAL SEAL.] *Notary Public.*

451 And the *said* FRANK H. SCOTT being first duly sworn by me to testify the truth, the whole truth and nothing but the truth relating to said cause, testified and deposed as follows:

Direct examination by G. W. NORTHRUP, JR.:

Interrogatory 1. Please state your name, age, residence and occupation.

Answer. Frank H. Scott; residence, Chicago; age forty-two years; occupation, attorney-at-law.

Int. 2. How long have you been practicing as an attorney and where?

A. Twenty-one years; all that time in the City of Chicago.

Int. 3. Are you at present connected with any firm of lawyers?

A. I am, and have been for a number of years, since the organization of the firm, a member of the firm of Hamline, Scott & Lord.

Int. 4. Who are the members of that firm?

A. John H. Hamline, Frank E. Lord and myself. Prior to that, from October, 1886, until the organization of the firm of Hamline, Scott & Lord, I was a member of the firm of Hamline & Scott, composed of John H. Hamline and myself.

Int. 5. Please state in a general way what line of legal practice that firm has conducted or carried on.

A. I think it can be properly described as general practice, excluding almost entirely any criminal practice.

Int. 6. Please state in a general way to what extent that firm and yourself as a member thereof have been engaged in the practice of law.

A. The firm has been from its organization, I think I may say, very actively engaged in the practice of law, and has transacted a very considerable volume of business, requiring in addition to the members of the firm, a considerable office force.

452

Int. 7. Please state whether or not, in the course of your practice, you have had occasion to ascertain and know the law of Illinois relating to the duties and liabilities of attorney and client, the practice and proceedings in actions by attorneys for their fees and compensation, the practice and proceedings in suits in assumpsit on the common counts, including the *quantum meruit* count, and pleadings of the defendants in such cases, the evidence and defenses admissible

in such suits, and the effect and consequences of judgments for the plaintiff and the defendant on such issues.

A. I have.

Int. 8. Please state whether or not during the time you have become familiar with and know the law of Illinois relating to assignments for the benefit of creditors, and the practice and proceedings in such cases?

A. I have, and have had a very considerable experience in that line of practice.

Int. 9. I will ask you a question which for convenience I will call Hypothetical Question A, viz: Assuming that a corporation, doing business in Illinois, makes a deed of voluntary assignment for the benefit of its creditors, in pursuance of the laws of the State of Illinois in that behalf, of all of its property, of whatsoever kind or nature, to an assignee; and assuming that the person so named as assignee duly qualified and employed a firm of Illinois lawyers to look after, direct and control all the legal matters of whatsoever kind and nature it would be necessary and proper for him as such assignee to have looked after, directed and controlled by lawyers; and
453 assuming that said firm of lawyers accepted said employment and agreed to look after, direct and control in behalf of said assignee, as such assignee as aforesaid, all the legal matters and business which his said position as assignee made it necessary and proper for him to have legal advice and services about and upon; and assuming that said assignment matter continued in Court in process of administration for some two or three months, and that during that period said firm of lawyers superintended the preparation of inventories and the procuring of orders of sale, and performed other legal services in connection with said trust estate, and in fact did look after, direct and control, in behalf of said assignee, all the legal matters and business which his said position as assignee made it necessary and proper for said assignee to have legal advice and services about and upon; and assuming that after said services were so performed said firm of lawyers sued said person so named as assignee, personally, in the Circuit Court of Cook County, Illinois, for their fees and compensation for, in and about all the legal advice and services so rendered by them, and filed as their declaration in said suit the common counts in assumpsit, including the *quantum meruit* count, and that said assignee was served with process in said action, and appeared therein and filed a plea of non assumpsit; and assuming that said action came on for trial in said Circuit Court, and that said assignee was present in person at the trial, and also represented at the trial by his counsel, and offered evidence on said trial; and assuming that on said trial both parties waived a jury, and submitted the issues to be tried by the Court without a jury, *and submitted the issues to be tried by the Court without a jury*, and
454 assuming that said Circuit Court on said trial made a finding in favor of said firm of lawyers, and against said assignee personally, that said lawyers were entitled upon a *quantum meruit* to recover several hundred dollars for said legal advice and services, and rendered judgment against said assignee personally,

in pursuance of said finding, in favor of said firm of lawyers; for said sum so found and costs of suit; please state in your opinion what is the law of Illinois as to whether or not if said assignee at the time of said trial, either in his capacity as assignee or individually, had any claim or claims against said firm of lawyers, based upon or growing out of any failure, neglect or misconduct of said firm of lawyers in connection with the services and duties which they had undertaken to perform, as hereinabove stated, said person so named as assignee could have set up said claims and offered evidence in support thereof on said trial under said plea of non assumpsit, and without filing any other pleadings or notices or other papers in said cause.

A. In my opinion, under the law of Illinois the assignee could have set up the claims supposed in the question and offered evidence in support thereof on the trial of that cause, under the pleadings as stated in the question, and without filing any other pleadings than those.

Int. 10. Assuming the same state of facts as that set forth in Hypothetical Question A to be proved, please state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued as stated in said Hypothetical Question A, would have had an election of remedies, viz: To either set up such claims (if any he had) in said suit brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit, and afterwards set up said claims in an original action against said lawyers

455 A. In my opinion the assignee would not, under the conditions supposed by the question, have an election of remedies, either to set up the claim in the suit brought by the lawyers or to permit judgment to be taken by them against him in the suit, and afterwards set up his claim in an original action against the lawyers, but he would be bound to assert such claims in the suit brought by the firm of lawyers as supposed by the question.

Int. 11. Assuming the same state of facts as that set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee pleaded personally, by way of counter claim, that said lawyers had been guilt of carelessness, neglect, failure or misconduct, as attorneys or otherwise, in and about or in connection with looking after, directing and controlling the legal matters and business which said assignee's position as assignee made it necessary and proper for him, as such assignee, to have legal advice and services about and upon;—please state whether or not in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter-claims, or whether or not, under the law of Illinois, said judgment so rendered would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by that judgment.

A. In my opinion, under the law of Illinois, the assignee would

not be permitted, in the suit brought on the judgment, to assert his counter-claims or to offer evidence in support of them, but the
456 judgment formerly rendered would be *res judicata* as to all such claims as were referred to in the question.

Int. 12. I will now ask you a question which for convenience I will call Hypothetical Question B, viz: Assuming the same state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment, and assuming that in said last named action said assignee pleaded personally by way of counter claim as follows: viz: Pleaded that after the payment of preferred claims and upon the dismissal of said assignment proceedings in the manner hereinafter stated, there were no assets of said corporation in the hands of said assignee, out of which, upon a proper order of Court, he could procure the money with which to pay the amount of said judgment, or any salary or compensation to himself as assignee as aforesaid, or to repay to himself as assignee any cash which he had advanced personally while so acting as assignee for the benefit of said trust estate, nor were there any assets with which, upon proper order of Court, he could pay any part, either of said judgment or of his own compensation, or pay any part of his own advances; and further pleaded, as a part of said counter claim, that but for the improper and fraudulent conduct of said firm of lawyers, in advising and giving legal advice to him as such assignee, as hereinafter stated, there would have been assets of said corporation in his hands at the time of the dismissal of said assignment, which the Court having jurisdiction, could have applied towards the payment of the indebtedness last above referred to; and further pleaded, as a part of said counter claim, that an order of sale of the assets of said corporation was procured to be made, and that
457 said sale was set and advertised for a certain date, and that *in* said day said assignee was present at the place set for the sale of said assets, and that one of the members of said firm of Chicago lawyers was present as his legal adviser, and that said assignee proceeded to cry the sale of said assets, and that bids were received from several persons; and further pleaded, as a part of said counter claim, that the last bid upon which the property was struck off was made by two parties jointly for an excess of $5300, and that the bid made next before the last named bid was made by one who was financially responsible and ready to make good his bid, who will, for brevity and convenience, be called O'Brien, and that said property was by said assignee struck off at said sale to said two parties making said last bid, and that thereupon said assignee demanded that a cash payment be made at once by said two parties upon their said bids, and that said two parties requested said firm of Chicago lawyers for leave to draw upon them for the amount of the cash payment necessary to make good their said bid, and that this authority was refused by said firm of lawyers, and that thereupon said two parties withdrew their said bid, and that thereupon said member of said firm of Chicago lawyers so present at said sale, as attorneys for said assignee, advised said assignee that he must at once re-offer said assets for sale,

and that the said assignee proceeded so to do, and that the said O'Brien was again a bidder, and that said member of said firm of Chicago lawyers also bid; and further pleaded, as a part of said counter claim, that after the said member of said firm of Chicago lawyers had made said two bids, the said O'Brien challenged the right, in the presence of said assignee, of said member of said firm of lawyers, to bid, because he was the attorney of said assignee, and publicly announced to said assignee, in the presence of said
458 lawyer, that he would not bid against said lawyer, and that he, O'Brien, thereupon refused to bid against said lawyer, and that O'Brien did not further bid against said lawyer, and that said lawyer bid only $3000 for the assets, and advised said assignee that the said sale must be made to said firm of Chicago lawyers for whom he was bidding, and advised said assignee to strike off said property to said firm, and that said assignee, acting upon said advice, did so strike off said property to said firm, and received from them a check upon a Chicago bank in payment of their said bid; and further pleaded, as a part of said counter claim, that said sale was referred to the Court having jurisdiction of said assignment, and in which said assignment proceedings were pending; but that before said sale was approved by the said Court by a proper order, the fact developed that after the sale a mortgagee of all the property of said corporation, (being the assets so offered for sale and so sold), had, in pursuance of law, gone into possession of the said property and was holding the same, and gave out that he intended to so hold the same against said assignee and the purchasers from said assignee; and further pleaded, as a part of said counter claim, that thereafter said firm of Chicago lawyers as individuals, and in their behalf only, and against the protests of said assignee, petitioned the said Court having jurisdiction of said assignment not to confirm said sale; and to release them from their bid, and that thereafter said mortgagee, having procured the consent in writing of the said debtor, to-wit: said corporation, and of a majority of its creditors in number and amount, in pursuance of the statute of the State of Illinois in that behalf, procured the discontinuance of said assignment proceedings,
459 and the said assignment proceedings were discontinued by order of Court; and further pleaded as a part of said counter claim that at the time of such discontinuance the said assignee did not have in his hands or possession any assets of said corporation out of which he could pay any part of said demand of said Chicago lawyers, for attorneys' fees or his own claims for compensation and cash advanced; and further pleaded as a part of said counter claim, that the said O'Brien was advised of the fact that said sale was made subject to mortgages, and all other facts in the premises, and was financially responsible and able to pay his said bid, and that upon said second offering he, O'Brien, would have bid an amount in excess of the amount so as aforesaid bid by said firm of lawyers, upon which the said sale was made, and that he O'Brien, would have completed the purchase if the property had been struck off to him, and that the said O'Brien was deterred from bidding at said second offering only by the fact that he was unwilling to bid against the

said firm of lawyers, so long as they were acting as the legal advisers of said assignee; and further pleaded as a part of said counter claim that the said acts of said firm of lawyers with respect to said sale were committed by them of their own motion, and without any collusion on the part of said assignee, either as assignee or individually, and that said assignee acted, in making said sale, upon the legal advice of said firm of lawyers, and not otherwise, and that said assignee never was a lawyer and was at said time ignorant of the legal effect of said conduct on the part of his legal advisers;—assuming, I say, the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment;
460 and assuming that in said last named action said assignee personally pleaded by way of counter claim the matters and claims above described and set forth, or any of them, or any similar or like claims, please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claims, or any pert thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of an*f* wiped out in and by said first judgment.

A. In my opinion under the law of Illinois the assignee would not in a suit on the judgment, be permitted to assert any of the counter claims or any claims of like nature that are supposed by the question, or to offer evidence in support of them, but under that law the judgment rendered against him would be conclusive, as to all of those claims, that they were unfounded.

Int. 13. Please state the legal principles existing in the law of Illinois upon which you base your last answer.

A. The principal reason is found in the fact that the exact thing at issue in the suit first brought by the lawyers was the same thing presented and sought to be relitigated by these counter claims. The declaration of the lawyers in the first suit was the common counts. Their recovery was upon the *quantum meruit*. The plea of the defendant was the general issue. The precise question presented by the county of *quantum meruit* was the value of the services and their value was put in issue directly by the plea. The Court could not find judgment on that issue for the plaintiffs without finding
461 that the services were of value. That involved the necessity of the consideration by the Court of every element that went into the question of their value. Under the law of Illinois, and particularly of the later decisions, it seems to be held that not only is the material and controlling fact *res judicata*, but that any other matter properly involved and which might have been raised or determined is necessarily settled by the judgment. But under the facts supposed it is not necessary to extent the doctrine in the measure last indicated, because the material fact and controlling fact in this case was the value of the services. Either the Court decided that or it de-

cided nothing. The duty of an attorney includes the bestowing of care, diligence and skill, and in addition to that he shall act in good faith and with integrity towards his client. In order to recover for the value of services a lawyer must show that all these elements were combined in his performance of the duties for that particular client. If he has failed in either of these particulars the defendant upon that issue of value may offer claims based upon such failure and produce evidence in support of them, for the purpose of showing that the services were not of value; and all claims supposed by the question are based upon the hypothesis that the lawyers failed in one or more of these necessary elements of their duty to their client in the premises. The adjudication in favor of the plaintiffs, therefore, conclusively settled these questions.

Int. 14. Assuming the state of facts set forth in Hypothetical Question A to be true, please state whether or not in your opinion under the law of Illinois, if said assignee at the time of said trial, had the claim or claims against said firm of Chicago lawyers above described in Hypothetical Question B, or any claims of like
462 character, said assignee could have set up such claims and relied upon the same and offered evidence in support thereof on said trial, under said plea of non assumpsit, by way of recoupment, or in reduction of the demands of said firm of Chicago lawyers in said action; further assuming, for the purposes of this question only, that the claims mentioned in Hypothetical Question B were valid and meritorious claims of some kind.

A. In my opinion, under the law of Illinois the assignee could have set up and relied on such claims and offered evidence in support of them in the suit referred to by the question; but I do not mean to be understood as saying that they or either of them would have constituted a valid claim.

Int. 15. Assuming the same state of facts as that set forth in Hypothetical Question A to be proved; and further assuming that said assignee had the claims described in the foregoing Hypothetical Question B, or any part thereof, or any claims of like character, please state whether or not in your opinion under the law of Illinois said assignee, when so personally sued, would have had an election of remedies, viz: either to set up such claims in said suit so brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit, and afterwards set up such claims in an original action against said lawyers.

A. In my opinion under the law of Illinois the assignee would not have had such election of remedies for the reasons given in a prior answer.

Int. 16. State whether or not in a proceeding in assignments for the benefit of cr litors an order of the Court having jurisdiction thereof must be procured charging the trust estate for the expenses of attorneys' fees and other similar costs and charges, in order that the assignee may be protected from personal liability.

463 A. It is not the practice in the State of Illinois to procure such orders, nor would the procuring of such an order protect the assignee from personal liability. The Court will not in advance

make an allowance for fees, and even if such an allowance were made, that is a matter between the Court and the assignee. The allowance is not to the attorney. The liability between the attorney and the assignee remains personal. The Court may at proper times make allowances to the assignee to cover expenses already incurred by him, but his liability to his attorneys does not depend at all upon the making or the refusing to make such allowances.

Int. 17. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein the said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim that said attorneys were requested during the course of their employment by said assignee to procure any and all orders of Court which would be necessary to protect him from personal liability for their attorneys' fees and expenditures and costs and charges of administering said estate; and further set up, by way of counter claim, that said attorneys failed and neglected to procure an order of Court authorizing the assignee's employment of them as attorneys, or authorizing the expenditures and costs and charges of the assignee in administering said estate, please state whether or not in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of said counter claims, or any part thereof, or any claims of like character, or whether or not,
464 under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. In my opinion under the law of Illinois if the claim had any validity or could be asserted anywhere, it could be asserted in a suit brought by the lawyers; that is to say, in their original suit on which judgment was obtained; and the judgment rendered in that suit would be a conclusive adjudication that the claims supposed were unfounded. The judgment would be *res adjudicata* of the claim and of like claims.

Int. 18. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last mentioned action said assignee set up personally, by way of counter claim, that an assignee's sale of the estate of said corporation was ordered by the Court, and that said attorneys, without the consent of the assignee, and in their own behalf, fraudulently by-bid at said sale; and further set up, by way of counter claim, that such by-bidding prevented a sale of the assets of said estate to a *bona fide* bidder, and that out of said *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys, under an order of Court thereafter to be obtained; and further set up by way of counter claim that such order could be obtained; and further set up by way of counter claim that afterwards the assign-

465 ment proceedings were thrown out of Court by consent in writing of the debtor and a majority in number and amount of the creditors of said corporation, pursuant to the Illinois statutes; and further set up by way of counter claim that this was done in the absence of the assignee, and without his knowledge, but with full knowledge on the part of said attorneys, and that no funds were left in the hands of the Court from which the assignee could reimburse himself for the said attorneys' fees or expenditures, costs and charges of administering said estate; and further set up by way of counter claim that before said assets were thrown out of Court the said attorneys failed and neglected to procure an order or orders, protecting the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate; please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claim, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. In my opinion, under the law of Illinois the assignee would not be permitted to offer evidence in support of claims such as are supposed by the question, nor in support of any claims of like character. The judgment theretofore rendered would be a final adjudication as to such claims and like claims.

(Signed) FRANK H. SCOTT.

Subscribed and sworn to before me this 31st day of August,
466 1899.

(Signed) WILSON E. McDERMUT,
[NOTARIAL SEAL.] *Notary Public.*

At this point the further taking of these depositions was continued by me until tomorrow, Wednesday, August 23, 1899, at 10 o'clock, A. M., at the same place.

The further taking of these depositions was resumed on Wednesday, August 23, 1899, at 10 o'clock, A. M., at the same place, pursuant to continuance.

Whereupon the said JOHN C. MATHIS being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, testified and deposed as follows, to-wit:

Direct examination by G. W. NORTHRUP, JR.:

Interrogatory 1. Please state your name, age, residence and occupation.

Answer. John C. Mathis; age, thirty-five; Chicago, Illinois; lawyer.

Int. 2. In what city are you engaged in the practice of law?

A. Chicago, Illinois.

Int. 3. How long have you been engaged in the practice of law and where?

A. For over twelve years; five years in Springfield, Illinois, and seven years in Chicago, Illinois.

467 Int. 4. Please state in a general way what kind or description of law practice you have pursued and been engaged in during that period.

A. I have been engaged in the general practice of the law in both the State and Federal Courts of Illinois.

Int. 5. Please state whether or not you are familiar with the law of Illinois relating to the duties and liabilities of attorney and client, the practice in suits in assumpsit generally, and particularly in suits in assumpsit by attorneys for their fees and compensation, the effect of judgments in such cases, the practice and law relating to assignments for the benefit of creditors under the Statutes of Illinois in that regard, and generally familiar with the laws and jurisprudence of this State.

A. I am.

Int. 6. I will ask a question which for convenience I will call Hypothetical Question A, viz: Assuming that a corporation doing business in Illinois makes a deed of voluntary assignment for the benefit of creditors, in pursuance of the laws of the State of Illinois in that behalf, of all of its property of whatsoever kind or nature, to an assignee; and assuming that the person so named as assignee duly qualified and employed a firm of Illinois lawyers to look after, direct and control all the legal matters of whatsoever kind and nature it would be necessary and proper for him, as such assignee, to have looked after, directed and controlled by lawyers; and assuming that said firm of lawyers accepted said employment and agreed to look after, direct and control, in behalf of said assignee, as assignee as aforesaid, all the legal matters and business which his said position as assignee made it necessary and proper for him to have legal advice and services about and upon; and assuming that said

468 assignment matter continued in Court in process of administration for some two or three months and that during that period said firm of lawyers superintended the preparation of inventories and the procuring of orders of sale, and performed other legal services in connection with said trust estate, and in fact did look after, direct and control, in behalf of said assignee, all the legal matters and business which his said position as assignee made it necessary and proper for said assignee to have legal advice and services about and upon; and assuming that after said services were so performed, said firm of lawyers sued said person so named as assignee, personally, in the Circuit Court of Cook County, Illinois, for their fees and compensation, for, in and about all the legal advice and services so rendered by them, and filed as their declaration in said suit the common counts in assumpsit, including the *quantum meruit* count, and that said assignee was served with process in said action and apeared therein and filed a plea of non-assumpsit; and assuming that said action came on for trial in said circuit court, and

that said assignee was present in person at the trial, and also represented at the trial by his counsel, and offered evidence on said trial; and assuming that on said trial both parties waived a jury and submitted the issues to be tried by the Court without a jury; and assuming that said Circuit Court on said trial made a finding in favor of said firm of lawyers and against said assignee personally that said lawyers were entitled upon a *quantum meruit* to recover several hundred dollars for said legal advice and services, and rendered judgment against said assignee personally, in pursuance of said finding, in favor of said firm of lawyers for said sum so found and costs of suit;—please state, in your opinion, what is the law of
469 Illinois as to whether or not, if said assignee at the time of said trial, either in his capacity as assignee or individually had any claim or claims against said firm of lawyers based upon or growing out of any failure, neglect or misconduct of said firm of lawyers in connection with the services and duties which they had undertaken to perform, as hereinabove state, said person so named as assignee could have set up said claims and offered evidence in support thereof of said trial under said plea of non-assumpsit, and without filing any other pleadings or notices or other papers in said cause.

A. In my opinion he could.

Int. 7. Assuming the same state of facts as that set forth in Hypothetical Question A to be true, please state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued, as stated in Hypothetical Question A, would have an election of remedies, viz: to either set up such claims (if any he had) in said suit brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit and afterwards set up said claims in an original action against said lawyers.

A. In my opinion he would not, but would have been compelled to set up such claims in the original suit brought by the firm of lawyers.

Int. 8. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment, and assuming that in said last named action said assignee pleaded personally, by way of counter claim, that said lawyers had been guilty of carelessness, neglect, failure or misconduct, as attorneys or otherwise, in and about or in connection with looking after, directing and controlling the legal matters and
470 business which said assignee's position as assignee made it necessary and proper for him as such assignee to have legal advice and services about and upon;—please state whether or not in your opinion under the law of Illinois said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claims, or whether or not, under the law of Illinois, said judgment so rendered would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded or had been finally disposed — and wiped out in and by that judgment.

A. In my opinion, in the suit on the judgment, the assignee would not be permitted to offer evidence in support of any counter claim of the character mentioned in the question, and the former judgment would be held a conclusive estoppel against his making any such counter claims in the second suit.

Int. 9. I will ask you a question which for convenience I will call Hypothetical Question B, viz: Assuming the same state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee pleaded personally by way of counter claim as follows, viz: Pleaded that after the payment of preferred claims and upon the dismissal of said assignment proceedings in the manner hereinafter stated there were no assets of said corporation in the hands of said assignee out of which, upon a proper order of Court, he could procure the money with which to pay the amount of said judgment, or any salary or compensation to himself as assignee as aforesaid, or to repay to himself as
471 assignee any cash which he had advanced personally while so acting as assignee for the benefit of the trust estate, nor were there any assets with which, upon proper order of Court, he could pay any part either of said judgment or of his own compensation, or pay any part of his own advances; and further pleaded as a part of said counter claim that but for the improper and fraudulent conduct of said firm of lawyers in advising and giving legal advice to him as such assignee, as hereinafter stated, there would have been assets of said corporation in his hands at the time of the dismissal of said assignment which the Court having jurisdiction could have applied towards the payment of the indebtedness last above referred to; and further pleaded, as a part of said counter claim that an order of sale of the assets of said corporation was procured to be made, and that said sale was set and advertised for a certain date, and that on said day said assignee was present at the place set for the sale of said assets, and that one of the members of said firm of Chicago lawyers was present as his legal adviser, and that said assignee proceeded to cry the sale of said assets and that bids were received from several persons; and further pleaded as a part of said counter claim that the last bid upon which the property was struck off was made by two parties jointly for an excess of $5300, and that the bid made next before the last named bid was made by one who was financially responsible and ready to make good his bid, who will, for brevity and convenience, be called O'Brien, and that said property was by said assignee struck off at said sale to said two parties making said last bid, and that thereupon said assignee demanded that a cash payment be made at once by said two parties upon their said bid, and that said two parties requested said firm of Chicago lawyers for leave to draw upon them for the
472 amount of the cash payment necessary to make good their said bid, and that this authority was refused by said firm of lawyers, and that thereupon said two parties withdrew their said bid, and that thereupon said member of said firm of Chicago lawyers so

present at said sale, as attorney for said assignee, advised said assignee that he must at once re-offer said assets for sale, and that the said assignee proceeded so to do, and that the said O'Brien was again a bidder and that said member of said firm of Chicago lawyers also bid; and further pleaded, as a part of said counter claim, that after the said member of said firm of Chicago lawyers had made said two bids the said O'Brien challenged the right, in the presence of said assignee, of said member of said firm of lawyers to bid because he was the attorney of said assignee, and publicly announced to said assignee, in the presence of said lawyer, that he would not bid against said lawyer, and that he, O'Brien, thereupon refused to bid against said lawyer, and that O'Brien did not further bid against said lawyer, and that said lawyer bid only $3000 for the assets, and advised said assignee that the said sale must be made to said firm of Chicago lawyers for whom he was bidding, and advised said assignee to strike off said property to said firm, and that said assignee, acting upon said advice, did so strike off said property to said firm, and received from them a check upon a Chicago bank in payment of their said bid; and further pleaded, as a part of said counter claim, that said sale was referred to the Court having jurisdiction of said assignment, and in which said assignment proceedings were pending, but that before said sale was approved by the said Court by a proper order the fact developed that after the sale a mortgagee of all the property of said corporation (being the assets so offered for sale and
473 so sold) had, in pursuance of law, gone into possession of the said property and was holding the same, and gave out that he intended to so hold the same against said assignee and the purchasers from said assignee; and further pleaded, as a part of said counter claim, that thereafter said firm of Chicago lawyers as individuals, and in their own behalf only, and against the protests of said assignee, petitioned the said Court having jurisdiction of said assignment not to confirm said sale and to release them from their bid, and that thereafter the said mortagee, having procured the consent in writing of the said debtor, to-wit: said corporation, and of a majority of its creditors in number and amount, in pursuance of the statute of the State of Illinois in that behalf, procured the discontinuance of said assignment proceedings, and the said assignment proceedings were discontinued by order of Court; and further pleaded, as a part of said counter claim, that at the time of such discontinuance the said assignee did not have in his hands or possession any assets of said corporation out of which he could pay any part of said demand of said Chicago lawyers for attorneys' fees or his own claims for compensation and cash advanced; and further pleaded, as a part of said counter claim, that the said O'Brien was advised of the fact that said sale was made subject to mortgages, and all other facts in the premises, and was financially responsible and able to pay his said bid, and that upon his second offering he, O'Brien, would have bid an amount in excess of the amount so as aforesaid bid by said firm of lawyers upon which the said sale was made, and that he, O'Brien, would have completed the purchase if the property had been struck off to him, and that the said O'Brien was deterred from bidding at

said second offering only by the fact that he was unwilling to
474 bid against the said firm of lawyers, so long as they were acting as the legal advisers of said assignee; and further pleaded, as a part of said counter claim, that the said acts of said firm of lawyers with respect to said sale were committed by them of their own motion, and without any collusion on the part of said assignee, either as assignee or individually, and that said assignee acted in making said sale upon the legal advice of said firm of lawyers and not otherwise, and that said assignee never was a lawyer and was at said time ignorant of the legal effect of said conduct on the part of his legal advisers;—assuming, I say, the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein, said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim the matters and claims above described and set forth, or any of them, or any similar or like claims, please state whether or not in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claims, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. In my opinion, under the laws of Illinois the assignee would not be permitted in the suit on the judgment to offer evidence in support of any counter claims of the kind or character specified in the Hypothetical Question, and in my opinion, under the law
475 of Illinois the former judgment rendered against the assignee personally would be held as a conclusive adjudication that the counter claims of the character mentioned in the question were either unfounded or had been finally settled and disposed of.

Int. 10. Assuming the state of facts set forth in Hypothetical Question A to be true, please state whether or not, in your opinion, under the law of Illinois, if said assignee, at the time of said trial, had the claim or claims against said firm of Chicago lawyers above described in Hypothetical Question B, or any claims of like character, said assignee could have set up such claims and relied upon the same, and offered evidence in support thereof on said trial, under said plea of non-assumpsit, by way of recoupment, or in reduction of the demands of said firm of Chicago lawyers in said action; further assuming, for the purposes of this question only, that the claims mentioned in Hypothetical Question B were valid and meritorious claims of some kind.

A. Yes, if it be assumed that the counter claims mentioned in Hypothetical Question B constituted a valid claim; but in my opinion the counter claims stated in said hypothetical question with reference to the sale or disposition of the assets of the insolvent would not constitute counter claims which ought to be allowed by any Court in any suit between the parties.

Int. 11. Assuming the same state of facts as that set forth in Hypothetical Question A to be true and further assuming that said assignee had the claims described in the foregoing Hypothetical Question B, or any part thereof, or any claims of like character, please state whether or not, in your opinion, under the law of Illinois, said assignee, when so personally sued, would have had an election of remedies, viz: Either to set up such claims in said
476 suit so brought by the said firm of lawyers, or to permit a judgment to be taken by them against him in said suit, and afterwards set up such claims in an original action against said lawyers.

A. In my opinion he would not have an election but would be required to set up his claims in the original suit.

Int. 12. I will ask you a question which for convenience I will call Hypothetical Question C, viz: Assuming the state of facts in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee pleaded personally by way of counter claim, as follows, viz: pleaded by way of counter claim that said assignee relied solely upon the advice and counsel of said firm of lawyers in his conduct and management of said estate and that said firm of lawyers never informed said assignee, and never in any way advised him, that it was the law in the State of Illinois, and had been so decided, that such an estate could only be made liable for the payment of legal services rendered to an assignee or person in like legal capacity by formal order duly entered authorizing the employment of a lawyer for the rendition of said services; and further pleaded in said counter claim that he, said assignee, was a layman, and did not know such to be the law, and that said firm of lawyers not only failed so to inform and advise said assignee but they further failed and neglected, as his attorneys in said trust, to procure any such order at any time, or attempt so to do, and that no such order was ever procured or attempted to be procured, and that no such order was ever made by any Court; and further pleaded in said counter claim that not until the trial of said suit had begun
477 did said firm of lawyers, or any agent or employé of them, ever inform said assignee in any way that in the absence of an order of the Court having jurisdiction of the subject matter of said assignment he, individually or personally, would be liable for legal services to him rendered as assignee in said assignment, and never informed him that they would hold him personally liable for any such services; and further pleaded in said counter claim that to the contrary, by letter and by word of mouth, they gave him to understand that the trust estate would be liable for their services as attorneys rendered to him as such assignee; and further pleaded in said counter claim that the said neglect of said firm of lawyers as aforesaid, to procure a proper order of the proper court, authorizing said assignee to employ attorneys for legal services and advice, and their neglect to inform said assignee that such an order of Court was necessary for his protection, personally and individually, was the

cause, and the only cause, of the rendition of the said judgment; and further pleaded in said counter claim that in the trial of said action by said attorneys for their said fees the said attorneys took the position that the Court having jurisdiction of the matter of the assignment of said corporation had never made and entered of record an order authorizing the employment of themselves as attorneys, or of any other attorneys, by said assignee as such assignee, and that no such order was ever made by any Court, and that they, said lawyers, had rendered services as attorneys for said assignee, which had been accepted by him, and that by the law, as it had been announced by the Supreme Court of Illinois and by the Appellate Court, by whose decisions the said Circuit Court of Cook County, was bound, the said assignee was personally and individually
478 liable to them, said attorneys, for such services rendered and accepted, in the absence of an order of Court having jurisdiction of the subject matter of said assignment, authorizing a charge against the said trust estate of the amount of their reasonable fees for services to be rendered, and that had been rendered, and adduced evidence in accordance with such position and said proposition of law; and further pleaded in said counter claim that said Circuit Court of Cook County, agreeably with said proposition of law, made the said finding against said assignee personally as upon a *quantum meruit* for services rendered to him as aforesaid by said firm of lawyers in the matter of said trust, and not otherwise; and entered judgment on said finding; and further pleaded in said counter claim that by reason of said facts said assignee was damaged by the rendition of said judgment, to-wit, to the amount of said judgment, and also his attorneys' fees and costs of litigation, and expenses of travel in going to Chicago to be present at said trial;—assuming, I say, the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein the said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim the matters and claims above described and set forth, or any of them, or any similar or like claims, please state whether or not in your opinion, under the law of Illinois, such assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claims, or any part thereof, or any claims of like character.

A. In my opinion the counter claims set forth in the question were necessarily included within the issues of the suit wherein the lawyers originally sued for their fees and compensation, and
479 the judgment rendered in such original suit would be a final adjudication as to these counter claims; and no evidence to support such counter claims could, in my opinion, be offered in the second suit on said former judgment.

Int. 13. Please state whether or not in your opinion it is or ever was the law of the State of Illinois, or has ever been decided that an estate in the hands of an assignee under a voluntary assignment for the benefit of creditors could only be made liable for the payment of legal services rendered to an assignee, or person in like legal capacity,

by a formal order, duly entered, authorizing the employment of a lawyer for the rendition of such services.

A. Such has never been the law.

Int. 14. Please state whether or not in your opinion it is or ever has been the law of Illinois that in a proceeding in an assignment for the benefit of creditors, an order of the Court having jurisdiction of such proceedings can be procured charging the trust estate for the expenses and attorneys' fees and other similar costs and charges so as to protect the assignee from personal liability.

A. No, sir.

Int. 15. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein the said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim that said attorneys were requested, during the course of their employment by said assignee, to procure any and all orders of Court which would be necessary to protect him from personal liability for their attorneys' fees and expenditures and costs and charges of ad-
480 ministering said estate; and further set up, by way of counter claim, that said attorneys failed and neglected to procure an order of Court authorizing the assignee's employment of them as attorneys, or authorizing the expenditures and costs and charges of the assignee in administering said estate;—please state whether or not in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of said counter claims, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded or had been finally disposed of and wiped out in and by said first judgment.

A. In my opinion the judgment rendered against the assignee personally, under the circumstances and conditions set forth in the question, would be a conclusive adjudication that the claims referred to in the question had been finally disposed of and adjudicated by the judgment rendered in the original suit.

Int. 16. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee set up personally, by way of counter claim, that an assignee's sale of the estate of said corporation was ordered by the Court, and that said attorneys, without the consent of the assignee, and in their own behalf, fraudulently by-bid at said sale; and further set up, by way of counter claim, that such by-bidding pre-
vented a sale of the assets of said estate to a *bona fide* bidder,
481 and that out of said *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys, under an order of Court thereafter to be obtained; and further set up by way of counter claim, that such order could be

obtained; and further set up, by way of counter claim, that afterwards the assignment proceedings were thrown out of Court by consent in writing of the debtor and a majority in number and amount of the creditors of said corporation, pursuant to the Illinois statutes; and further set up, by way of counter claim, that this was done in the absence of the assignee, and without his knowledge, but with full knowledge on the part of said attorneys, and that no funds were left in the hands of the Court from which the assignee could reimburse himself for the said attorneys' fees or expenditures, costs and charges of administering said estate; and further set up, by way of counter claim, that before said assets were thrown out of Court the said attorneys failed and neglected to procure any order or orders protecting the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate;—please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claim, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. In my opinion the original judgment rendered against the assignee personally would be a final adjudication of the
482 counter claims of the defendant contained in the question, and the defendant, in the second suit would not be permitted to offer evidence in support of such counter claims.

Int. 17. Assuming the same state of facts as that set forth in Hypothetical Question A to be true, please state whether or not in your opinion, under the law of Illinois, the said assignee so personally sued as stated in Hypothetical Question A, would have had an election of remedies, viz: Either to set up the claims mentioned in the last two interrogatories propounded to you, if he had any such, in said suit brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit, and afterwards set up such claims in an original action against said lawyers.

A. In my opinion the defendant in the original suit would not have had an election of remedies. The question necessarily at issue in the first suit was the value and character of the services of the lawyers, and all of the counter claims mentioned in the question were necessarily involved in the issues of that case, and it was his duty to bring forward the same in that action. The settled rule in Illinois is that a question which is involved within the issues of a former controversy is conclusively settled as between the parties by the decision in that controversy, whether the Court in its judgment passed specifically on that particular question or not.

(Signed) JOHN C. MATHIS.

Subscribed and sworn to before me this 31st day of August, 1899.

(Signed) WILSON E. McDERMUT,

[NOTARIAL SEAL.] *Notary Public.*

483 At this point the further taking of these depositions was continued by me until Thursday, August 24, 1899, at ten o'clock A. M., at the same place.

The further taking of these depositions was resumed on Thursday, August 24, 1899, at ten o'clock A. M., at the same place, pursuant to continuance.

Whereupon the said HORACE K. TENNEY being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, testified and deposed as follows:

Direct examination by G. W. NORTHRUP, JR.:

Interrogatory 1. Please state your name, age, residence and occupation.

Answer. My name is Horace K. Tenney; I am nearly forty years old; I am an attorney at law, practicing in the City of Chicago, where I reside.

Int. 2. Please state how long you have been engaged in the practice of law and where.

A. I have been practicing at the Chicago bar for a little over eighteen years.

Int. 3. Are you practicing alone or as a member of a firm?

A. I am a member of the firm of Tenney, McConnell, Coffeen & Harding.

Int 4. Please give the names of the members of that firm.

A. The senior member is Judge Samuel P. McConnel, and the other members are M. L. Coffeen, Charles F. Harding and

484 myself.

Int. 5. How long have you been a member of that firm?

A. I have been a member of that firm ever since it was organized, which was nearly five years ago. I have been a member of the predecessors of that firm, whose membership was different from time to time, for nearly fourteen years.

Int. 6. Please state in a general way the character of the law practice which you have carried on and which the firms with which you have been connected have conducted?

A. It has been very largely commercial law, covering all kinds of commercial transactions, corporation law, the law with reference to assignments, and litigated matters of all kinds that come within the range of general civil practice.

Int. 7. Will you please state to what extent you have been connected with and concerned in carrying on and conducting and looking after matters in cases of assignments for the benefit of creditors, under the laws of Illinois?

A. Well, to a very large extent. I could not say to just what extent, but we have had in the office, and I have had under my personal charge, all of the time that I have been practicing law, some case involving questions of assignments for the benefit of creditors under the Illinois law.

Int 8. Please state whether or not you are familiar with the laws

of Illinois relating to the duties and liabilities of attorney and client, the practice in suits in assumpsit in their various branches, and particularly suits in assumpsit by attorneys for their fees and compensation, the practice and pleadings in such suits, the effect of judgments in such cases, and the practice and law relating to assignments for the benefit of creditors under the Illinois statute, and are
485 generally familiar with the laws and jurisprudence of this State?

A. I think I am. I have had occasion often to examine and have examined the laws of Illinois with reference to the particular subjects that have been mentioned.

Int. 9. Have you had any recent or particular connection or experience in suits involving questions of *res judicata*, and what questions are determined by prior adjudications?

A. I have. I was very recently one of the attorneys in a case which went to the Supreme Court of this State involving that subject, and in the course of my connection with that case I made a very careful and exhaustive examination of the law of Illinois with reference to the subject of *res judicata*. I have had a number of other cases in which the same questions and the same subjects were involved, and have had occasion to examine the law with reference to them also, and have conducted those cases through the Courts of Illinois.

Int. 10. I will ask a question which for convenience I will call Hypothetical Question A, viz: Assuming that a corporation doing business in Illinois makes a deed of voluntary assignment for the benefit of its creditors, in pursuance of the laws of the State of Illinois in that behalf, of all of its property of whatsoever kind or nature, to an assignee; and assuming that the perso-*na* named as assignee duly qualified and employed a firm of Illinois lawyers to look after, direct and control all the legal matters, of whatsoever kind and nature, it would be necessary and proper for him as such assignee to have looked after, directed and controlled by lawyers; and assuming that said firm of lawyers accepted said employment and agreed to look after, direct and control, in behalf of said assignee,
486 as assignee as aforesaid, all the legal matters and business which his said position as assignee made it necessary and proper for him to have legal advice and services about and upon and assuming that said assignment matter continued in Court in process of administration for some two or three months, and that during that period said firm of lawyers superintended the preparation of inventories and the procuring of orders of sale, and performed other legal services in connection with said trust estate; and in fact did look after, direct and control, in behalf of said assignee, all the legal matters and business which his said position as assignee made it necessary and proper for said assignee to have legal advice and services about and upon; and assuming that after said services were so performed said firm of lawyers sued said person so named as assignee, personally, in the Circuit Court of Cook County, Illinois, for their fees and compensation, for, in and about all the legal advice and services so rendered by them, and filed as their declaration in said suit the common counts in assumpsit, including the *quantum meruit*

count, and that said assignee was served with process in said action and appeared therein, and filed a plea of non-assumpsit; and assuming that said action came on for trial in said circuit Court, and that said assignee was present in person at the trial, and also represented at the trial by his counsel, and offered evidence on said trial; and assuming that on said trial both parties waived a jury and submitted the issues to be tried by the Court without a jury; and assuming that said circuit court on said trial made a finding in favor of said firm of lawyers and against said assignee personally that said lawyers were entitled upon a *quantum peruit* to recover several hundred dollars for said legal advice and services, and rendered
487 judgment against said assignee personally, in pursuance of said finding, in favor of said firm of lawyers for said sum so found and costs of suit;—please state, in your opinion, what is the law of Illinois as to whether or not, if said assignee at the time of said trial, either in his capacity as assignee or individually, had any claim or claims against said firm of lawyers based upon or growing out of any failure, neglect or misconduct of said firm of lawyers in connection with the services and duties which they had undertaken to perform, as hereinabove stated, said person so named as assignee could have set up said claims and offered evidence in support thereof on said trial, under said plea of non assumpsit, and without filing any other pleadings or notices or other papers in said cause.

A. It is *jy* opinion that by the law of Illinois if the assignee had any claim against the lawyers who are the plaintiffs in the suit, growing out of any failure, neglect or misconduct on their part in connection with the services and duties which they had undertaken to perform for him under their retainer, he could have set them up and offered evidence in support of them, at the trial; and this could have been done under the plea of the general issue or non-assumpsit, and without filing a special plea.

Int. 11. Assuming the same state of facts as that set forth in Hypothetical Question A to be true, please state whether or not in your opinion, under the law of Illinois the said assignee so personally sued as stated in Hypothetical Question A would have an election of remedies, viz: Either to set up such claims (if any he had) in said suit brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit and afterwards set up said claims in an original action against said lawyers.

A. I do not think that under the law of Illinois the as-
488 signee, the defendant in the suit, would have the right to elect between setting up the claim as a defense, either in whole or partially, to the suit, and omitting to do so, bringing another suit afterwards to recover for it. I think that under the law of Illinois the subject matter of his claim, arising as it does out of an alleged violation of the contract under which the plaintiffs sued, or out of the violation of a duty which was imposed upon the plaintiffs by that contract, was necessarily involved within the issue of the case, and that a judgment in favor of the plaintiffs would conclude the assignee, the defendant, from afterwards bringing any suit against the attorneys based upon the theory stated.

Int. 12. Assuming the state of facts set forth in Hypothetical

Question A to be true; and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action, said assignee pleaded personally, by way of counter claim, that said lawyers had been guilty of carelessness, neglect, failure or misconduct as attorneys or otherwise, in and about or in connection with looking after, directing and controlling the legal matters and business which said assignee's position as assignee made it necessary and proper for him as such assignee to have legal advice and services about and upon; please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted, in said suit on said judgment, to offer evidence in support of such counter claims, or whether or not, under the law of Illinois, said judgment so rendered would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded or had been finally disposed of and wiped out in and by that judgment.

489 A. In my judgment the assignee would not be permitted in a suit upon the judgment to offer evidence in support of a counter claim based upon the alleged violation by the attorneys of their contract of employment or of any of the duties which that contract imposed, or of any carelessness, neglect or misconduct on their part, but that the judgment would be conclusive against the assignee upon all of these questions.

Int. 13. I will ask a question which for convenience I will call Hypothetical Question B, viz: Assuming the same state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment, and assuming that in said last named action said assignee pleaded personally by way of counter claim as follows, viz: Pleaded that after the payment of preferred claims and upon the dismissal of said assignment proceedings in the manner hereinafter stated there were no assets of said corporation in the hands of said assignee out of which, upon a proper order of Court, he could procure money with which to pay the amount of said judgment, or any salary or compensation to himself as assignee as aforesaid, or to repay to himself as assignee any cash which he had advanced personally while so acting as assignee for the benefit of said trust estate, nor were there any assets with which, upon proper order of Court, he could pay any part, either of said judgment or of his own compensation, or pay any part of his own advances; and further pleaded, as part of said counter claim, that but for the improper and fraudulent conduct of said firm of lawyers in advising and giving legal advice to him as such assignee, as hereinafter

490 stated, there would have been assets of said corporation in his hands at the time of the dismissal of said assignment which the Court having jurisdiction would have applied towards the payment of the indebtedness last above referred to, and further pleaded, as a part of said counter claim, that an order of sale of the assets of said corporation was procured to be made, and that said sale was set and advertised for a certain date, and that on said day said assignee was present at the place set for the sale of said assets,

and that one of the members of said firm of Chicago lawyers was present as his legal adviser, and that said assignee proceeded to cry the sale of said assets, and that bids were received from several persons; and further pleaded, as a part of said counter claim, that the last bid upon which the property was struck off was made by two parties jointly for an excess of $5300, and that the bid made next before the last named bid was made by one who was financially responsible and ready to make good his bid; who will, for brevity and convenience, be called O'Brien, and that said property was by said assignee struck off at said sale to said two parties making said last bid, and that thereupon said assignee demanded that a cash payment be made at once by said two parties upon their said bid, and that said two parties requested said firm of Chicago lawyers for leave to draw upon them for the amount of the cash payment necessary to make good their said bid, and that this authority was refused by said firm of lawyers, and thereupon said two parties withdrew their said bid, and that thereupon said member of said firm of Chicago lawyers so present at said sale as attorney for said assignee advised said assignee that he must at once re-offer said assets for sale, and that the said assignee proceeded so to do, and that the said O'Brien was
491 again a bidder, and that said member of said firm of Chicago lawyers also bid; and further pleaded, as a part of said counter claim, that after the said member of said firm of Chicago lawyers had made said two bids, the said O'Brien challenged the right, in the presence of said assignee, of said member of said firm of lawyers to bid, because he was the attorney of said assignee, and publicly announced to said assignee, in the presence of said lawyer, that he would not bid against said lawyer, and that he, O'Brien, thereupon refused to bid against said lawyer, and that said lawyer bid only $3000 for the assets, and advised said assignee that the said sale must be made to said firm of Chicago lawyers for whom he was bidding, and advised said assignee to strike off said property to said firm, and that said assignee, acting upon said advice, did so strike off said property to said firm, and received from them a check upon a Chicago bank in payment of their said bid; and further pleaded, as a part of said counter claim, that said sale was referred to the Court having jurisdiction of said assignment, and in which said assignment proceedings were pending, but that before said sale was approved by the said Court by a proper order the fact developed that after the sale a mortgagee of all the property of said corporation (being the assets so offered for sale and so sold), had, in pursuance of law, gone into possession of the said property and was holding the same, and gave out that he intended to so hold the same against said assignee and the purchasers from said assignee; and further pleaded, as a part of said counter claim, that thereafter said firm of Chicago lawyers, as individuals, and in their own behalf only, and against the protests of said assignee, petitioned the said Court having jurisdiction of said assignment, not to confirm said sale, and to release them from
492 their bid, and that thereafter the said mortgagee, having procured the consent in writing of the said debtor, to-wit: said corporation, and of a majority of its creditors in number and amount, in pursuance of the Statute of the State of Illinois in that

behalf, procured the discontinuance of said assignment proceedings, and the said assignment proceedings were discontinued by order of Court; and further pleaded, as a part of said counter claim, that at the time of such discontinuance the said assignee did not have in his hands or possession any assets of said corporation out of which he could pay any part of said demand of said Chicago lawyers for attorneys' fees or his own claims for compensation and cash advanced; and further pleaded, as a part of said counter claim, that the said O'Brien was advised of the fact that said sale was made subject to mortgages, and all other facts in the premises and was financially responsible and able to pay his said bid, and that upon said second offering he, O'Brien, would have bid an amount in excess of the amount so as aforesaid bid by said firm of lawyers upon which the said sale was made, and that he, O'Brien, would have completed the purchase if the property had been struck off to him, and that the said O'Brien was deterred from bidding at said second offering only by the fact that he was unwilling to bid against the said firm of lawyers so long as they were acting as the legal advisers of said assignee; and further pleaded, as a part of said counter claim, that the said acts of said firm of lawyers with respect to said sale were committed by them of their own motion, and without any collusion on the part of said assignee, either as assignee or individually, and that said assignee acted, in making said sale, upon the legal advice of said firm of lawyers, and not otherwise, and that said assignee never was a lawyer, and was at that time ignorant of the legal effect of
493 said conduct on the part of his legal advisers;—assuming, I say, the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein, said form of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded, by way of counter claim, the matters and claims above described and set forth, or any of them, or any similar or like claims, please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment, to offer evidence in support of such counter claims, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. I think that under the law of Illinois the assignee would not be permitted to set up such counter claim or to offer evidence in support of it as a defense to an action upon the judgment, but that any such claim on his part was conclusively adjudicated against him by the judgment in the first suit.

Int. 14. Assuming the state of facts set forth in Hypothetical Question A to be true, please state whether or not in your opinion, under the law of Illinois, if said assignee at the time of said trial had the claim or claims against said firm of Chicago lawyers above described in Hypothetical Question B, or any claims of like character, said assignee could have set up such claims and relied upon the same,

and offered evidence in support thereof on said trial, under
494 said plea of non assumpsit, by way of recoupment, or in reduction of the demands of said firm of Chicago lawyers in said action; further assuming, for the purposes of this question only, that the claims mentioned in Hypothetical Question B were valid and meritorious claims of some kind.

A. Assuming that the facts stated would create a legal claim in favor of the assignee, he could under the laws of Illinois, have set it up as a defense, and offered evidence in support of it on the trial of the suit, under the plea of non-assumpsit, either as a defense in whole or in part, or as a recoupment, or reduction of the amount of the plaintiff's recovery. (I wish to state, however, that in my judgment, under the law of Illinois, the facts stated would not create
Out. any claim in favor of the assignee and against the attorneys.)

Int. 15. Assuming the same state of facts as that set forth in Hypothetical Question A to be true, and further assuming that said assignee had the claims described in the foregoing Hypothetical Question B, or any part thereof, or any claims of like character, please state whether or not, in your opinion, under the law of Illinois, said assignee when so personally sued would have had an election of remedies, viz: either to set up such claims in said suit so brought by said firm of lawyers, or to permit a judgment to be taken by them against him in said suit, and afterwards set up such claims in an original action against said lawyers.

A. I do not think that under the law of Illinois he would have an election of remedies. The claim, if it existed, necessarily arose out of the transactions and the contract upon which the plaintiff's suit and right to recover depended, and the adjudication that the plaintiff was entitled to recover necessarily adjudicated against
495 the defendant the existence of any such claim on his part.

Int. 16. I will ask you a question which for convenience I will call Hypothetical Question C, viz: Assuming the state of facts in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee pleaded personally by way of counter claim as follows, to-wit: pleaded by way of counter claim that said assignee relied solely upon the advice and counsel of said firm of lawyers in his conduct and management of said estate, and that said firm of lawyers never informed said assignee, and never in any way advised him, that it was the law in the State of Illinois, and has been so decided, that such an estate could only be made liable for the payment of legal services rendered to an assignee, or person in like capacity, by formal order, duly entered, authorizing the employment of a lawyer for the rendition of said services; and further pleaded in said counter claim that he, said assignee, was a layman, and did not know such to be the law, and that said firm of lawyers not only failed so to inform and advise said assignee, but they further failed and neglected, as his attorneys in said trust, to procure any such order at any time, or attempt so to do, and that no such order

was ever procured or attempted to be procured; and that no such order was ever made by any Court; and further pleaded in said counter claim that not until the trial of said suit had begun did said firm of lawyers, or any agent or employé of them, ever inform said assignee in any way that in the absence of an order of the Court having jurisdiction of the subject matter of said assignment he, individually or personally, would be liable for legal services to him ren-
496 dered as assignee in said assignment, and never informed him that they would hold him personally liable for any such services; and further pleaded in said counter claim that to the contrary, by letter and by word of mouth, they gave him to understand that the trust estate would be liable for their services as attorneys, rendered to him as such assignee; and further pleaded in said counter claim that the said neglect of said firm of lawyers as aforesaid to procure a proper order of the proper Court, authorizing said assignee to employ attorneys for legal services and advice, and their neglect to inform said assignee that such an order of Court was necessary for his protection, personally and individually, was the cause and the only cause of the rendition of said judgment; and further pleaded in said counter claim that in the trial of said action by said attorneys for their said fees the said attorneys took the position that the Court having jurisdiction of the matter of the assignment of said corporation had never made and entered of record an order authorizing the employment of themselves as attorneys, or of any other attorneys by said assignee as such assignee, and that no such order was ever made by any Court, and that they, said lawyers, had rendered services as attorneys for said assignee, which had been accepted by him, and that by the law, as it had been announced by the Supreme Court of Illinois and by the Appellate Court, by whose decisions the said Circuit Court of Cook County was bound, the said assignee was personally and individually liable to them, said attorneys, for such services rendered, and accepted, in the absence of an order of Court having jurisdiction of the subject matter of said assignment, authorizing a charge against the said trust estate of the amount of their reasonable fees for services to be rendered, and that had been rendered,
497 and adducing evidence in accordance with such position and said proposition of law; and further pleaded in said counter claim that said Circuit Court of Cook County, agreeably with said proposition of law, made the said finding against said assignee personally as upon a *quantum meruit* for services rendered to him as aforesaid by said firm of lawyers in the matter of said trust, and not otherwise; and entered judgment on said finding; and further pleaded in said counter claim that by reason of said facts said asignee was damaged by the rendition of said judgment, to-wit: to the amount of said judgment, and also his attorneys' fees and costs of litigation, and expenses of travel in going to Chicago to be present at said trial;—assuming, I say the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein the said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim the

matters and claims above described and set forth, or any of them, or any similar or like claims, please state whether or not in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claims, or any part thereof, or any claims of like character.

A. I do not think that under the law of Illinois the assignee in a suit upon the judgment would be permitted to set up as a defense or counter claim the facts assumed in the question.

Int. 17. Please state why, in your opinion, said assignee would not be permitted, under the law of Illinois, in said suit on said judgment to offer evidence in support of such counter claims described
498 in the last interrogatory or counter claims of like character.

A. The existence of such counter claims is inconsistent with the theory upon which the plaintiffs recovered judgment against the assignee, as stated in the hypothetical question. The facts assumed would show or tend to show no more than that the attorneys had not performed the services which they contracted to perform, or had neglected or violated the duties which their contract of employment imposed upon them. If such had been the fact it was a defense to the original claim which was based upon their contract of retainer. They necessarily recovered upon the theory that they had performed their contract, and as they recovered upon a *quantum meruit* the Court necessarily found that the sum for which judgment was rendered represented the value of their services after allowing to the defendant any claim based upon their failure to fully perform their contract. If their contract obligated them to procure an order of Court with reference to the payment of fees, and they did not procure such order, this would constitute a defense, in whole or in part, to their claim. The theory of the existence of a claim in favor of the assignee against them for their failure to procure the order is necessarily inconsistent with their right to recover against him without procuring such order. The judgment in their favor establishes the fact that they were entitled to recover, and therefore precludes the assignee from asserting that they violated their duty and thus made themselves liable to him in not procuring the order.

Int. 18. Please state whether or not it is the law in the State of Illinois, or has ever been so decided, that an estate of an insolvent in the hands of an assignee for the benefit of creditors, could only
499 be made liable for the payment of legal services rendered to an assignee or person in like legal capacity, by a formal order, duly entered, authorizing the assignee to employ a lawyer to render such services.

A. In my judgment *sich* is not the law of Illinois, nor has it ever been so decided.

Int. 19. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein the said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee personally pleaded by way of counter claim that said attorneys were requested, during the course of their employment by said assignee, to procure any and all orders of Court which

would be necessary to protect him from personal liability for their attorneys' fees and expenditures and costs and charges of administering said estate; and further set up by way of counter claim that said attorneys failed and neglected to procure an order of Court authorizing the assignee's employment of them as attorneys, or authorizing the expenditures and costs and charges of the assignee in administering said estate;—please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of said counter claims, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. I do not think the assignee would be permitted to
500 offer such evidence, or set up any such defense, either by way of counter claim or otherwise, but that under the law of Illinois, the judgment would conclusively adjudicate against the assignee that the claims so set up were unfounded, or that if they had any existence he received the allowance for the full amount in determining the amount of the judgment in favor of the attorneys in the first suit.

Int. 20. Assuming the state of facts set forth in Hypothetical Question A to be true, and assuming that after obtaining the judgment mentioned therein said firm of lawyers sued said assignee personally on said judgment; and assuming that in said last named action said assignee set up personally, by way of counter claim, that an assignee's sale of the estate of said corporation was ordered by the Court, and that said attorneys, without consent of the assignee, and in their own behalf, fraudulently by-bid at said sale; and further set up by way of counter claim, that such by-bidding prevented a sale of the assets of said estate to a *bona fide* bidder, and out of said *bona fide* bid the assignee would have realized funds for the payment of his costs and expenses and his said attorneys, under an order of Court therafter to be obtained; and further set up, by way of counter claim that such order could be obtained; and further set up, by way of counter claim, that afterwards the assignment proceedings were thrown out of Court by consent in writing of the debtor and a majority in number and amount of the creditors of said corporation, pursuant to the Illinois Statutes; and further set up, by way of counter claim, that this was done in the absence of the assignee, and without his knowledge, but with full knowledge on the part of said attorneys, and that no funds were left in the hands of the Court from which the said assignee could reimburse himself for the said attorneys' fees or expenditures, costs and
501 charges of administering said estate; and further set up, by way of counter claim, that before said assets were thrown out of Court the said attorneys failed and neglected to procure any order or orders protecting the said assignee for his expenditures, costs and charges and attorneys' fees in administering said estate;—

please state whether or not, in your opinion, under the law of Illinois, said assignee would be permitted in said suit on said judgment to offer evidence in support of such counter claim, or any part thereof, or any claims of like character, or whether or not, under the law of Illinois, said judgment so rendered against said assignee personally would be a conclusive adjudication that said claims so set up by said assignee in said second suit were unfounded, or had been finally disposed of and wiped out in and by said first judgment.

A. My answer to this question would be the same as the answer to the preceding question.

(Signed) HORACE KALB TENNEY.

Subscribed and sworn to before me this first day of September, 1899.

(Signed) WILSON E. McDERMUT,
[NOTARIAL SEAL.] *Notary Public.*

STATE OF ILLINOIS, *County of Cook*, ss:

I, Wilson E. McDermut, a Notary Public within and for said County of Cook and State of Illinois, do hereby certify that the foregoing depositions of Edward J. Judd, Simeon P. Shope, Frank H. Scott, John C. Mathis and Horace K. Tenney, hereinabove
502 set forth, were taken by me at the office of Newman, Northrup & Levinson, in the Chamber of Commerce Building, in the City of Chicago, County of Cook and State of Illinois, commencing on the 21st day of August, A. D. 1899, at the hour of eleven o'clock A. M., and continuing thereafter from day to day, at the several times to which the taking of said depositions was continued by me, as set forth in the foregoing depositions, and that said depositions, and every part thereof, were wholly taken at the place aforesaid, between the hours of ten o'clock A. M. and five o'clock P. M. That neither the said Harry B. Gates nor any person on his behalf was present at the taking of said depositions. That prior to the commencement of the examination of said Edward J. Judd, Simeon P. Shope, Frank H. Scott, John C. Mathis and Horace K. Tenney, and each of them respectively, they were each repectively by me first duly sworn according to law, to testify the truth, the whole truth and nothing but the truth relating to said cause. That their said depositions and each of them were reduced to writing by me, and after the respective deposition of each of said witnesses respectively had been so reduced to writing by me the same was carefully read over by said witnesses respectively, and subscribed and sworn to by said witnesses respectively, the oath being administered by me.

In testimony whereof, I have hereunto set my hand and Notarial Seal this First day of September A. D. 1899.

(Signed) WILSON E. McDERMUT,
[NOTARIAL SEAL.] *Notary Public in and for the County of Cook and State of Illinois.*

(Certificate of magistracy attached.)

503 Whereupon the hour of five o'clock having arrived the Court adjourned until tomorrow, Thursday, December 7, 1899, at nine o'clock A. M.

THURSDAY, *December* 7, 1899.

Court met pursuant to adjournment.

Present the same as on yesterday.

The hearing of the evidence was resumed as follows:

Mr. MARTINDALE: Now, may the Court please, on behalf of the plaintiffs I will read in evidence the depositions of Charles S. Cutting and Edgar B. Tolman, taken in this case at Chicago on the 16th day of January, 1895.

By agreement Questions numbered from 5 to 14 inclusive and answers thereto in the deposition of Charles S. Cutting are omitted; and by agreement Questions numbered from 3 to 11 inclusive, and the answers thereto in the deposition of Edgar B. Tolman are omitted.

The said depositions, except as to the parts omitted by agreement, were admitted and read in evidence, the same being in the words and figures following, to-wit:

504 STATE OF INDIANA, *County of Marion, ss:*

In the Superior Court of Marion County.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

The depositions of Charles S. Cutting and Edgar B. Tolman, witnesses produced and sworn before me, Robert G. Hall, a Notary Public in and for the County of Cook and State of Illinois, at the office of Newman and Northrup, Room 802 Chamber of Commerce Building, in the City of Chicago, in said County of Cook and State of Illinois, on the 16th day of January, A. D. 1905, pursuant to the annexed notice.

These depositions were taken on the part of the plaintiffs in a certain action now pending in the said Superior Court of Marion County, Indiana, wherein Jacob Newman, George Northrup, Jr., and S. O. Levinson are plaintiffs, and Harry B. Gates is defendant.

Present on the taking of said depositions: As counsel for the said plaintiffs, Mr. Charles Martindale. As counsel for the said defendant, Mr. Edward E. Gates.

505 The said CHARLES S. CUTTING, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by Mr. MARTINDALE:

Question 1. Mr. Cutting, please state your name, age and place of residence?

Answer. My name is Charles S. Cutting; I am 40 years of age; my residence is Palatine, Cook County, Illinois; my place of business is Chicago, Illinois.

Question 2. State your occupation?

Answer. I am an attorney-at-law.

Question 3. Practicing in Cook County, in the State of Illinois?

Answer. Yes sir.

Question 4. How long have you been practicing as a licensed practitioner before the Supreme Court and other courts of the State of Illinois?

Answer. Fourteen years.

Question 5. Please tell me, Mr. Cutting, what the statute law of the State of Illinois is in relation to amendments in civil suits, and in order to direct your attention to the point, I will ask you to refer to the statutes of the State of Illinois?

Answer. Section 24 of the Revised Statutes of Hurd's Practice Act,—the statute relative to Amendments is:

"At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any manner, either of form or substance,
506 in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense. The adjudication of the Court allowing an amendment shall be conclusive evidence of the identity of the action."

Question 6. I will ask you to identify the book to which you have referred?

Answer. I refer to Section 23 of the Act of the Legislature of Illinois in regard to practice in courts of record, approved February 22, 1872, in force July 1, 1872, and is what is popularly known as the Practice Act of the State of Illinois. The book from which I get this is Hurd's Revised Statutes of Illinois for 1893.

Question 7. I will ask you if that book is accepted as evidence of the Statute Law of the State of Illinois in the Courts of Illinois?

Answer. It is, everywhere.

Question 8. It is an authorized edition by the General Assembly of the State of Illinois?

Answer. Yes sir.

Question 9. Will you kindly tell me what the Statute provisions in the State of Illinois are in relation to amendments and jeofails, and I will direct your attention to the 4th and 5th subdivisions of Section 6 of that Statute?

Answer. Section 6 provides: "Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the Court, or upon confession *nil dicit* or *non sum informatus*, or upon any writ or inquiry of damages, be reversed, impaired, or in any way affected by reason of the following imperfections, omissions, defects, matters, or things in the process, pleadings, proceed-
507 ings, or records,

"Fourth Subdivision: For any variance between the

original writ or process and the declaration, bill, petition, plaint, or demand.

"Fifth: For any mispleading, insufficient pleading, lack of color, miscontinuance, discontinuance, or misjoining of the same, or want of a joinder of the issue."

Question 10. Will you kindly identify the book to which you have referred in answering the last question?

Answer. I have taken this from Hurd's Revised Statutes of the State of Illinois for 1893, being the same book to which I have heretofore referred in my testimony.

Question 11. What is the law of the State of Illinois as to the right of the plaintiff where he has brought an action of assumpsit against two defendants, to dismiss his action as to one of the defendants and proceed in his suit as upon a several promise?

Answer. It is the law of Illinois, well-recognized, that in an action of assumpsit against two defendants, the plaintiff may dismiss his action as to one of the defendants, and the case will then proceed as in his suit against the remaining defendant, as upon a several promise. Judgment may be rendered against the single defendant, and the amendment may be made either before or after judgment.

Question 12. Would such dismissal and amendments in any way impair the judgment of the Court?

Answer. Not at all, sir.

Question 13. What are the provisions of the Statutes of the State of Illinois relating to joint obligations, as to whether they are joint, or joint and several?

Answer. I refer to Section 3, Chapter 76, Statutes of Illinois, entitled "Joint Rights and Obligations," being Act of the General Assembly of the State of Illinois, approved February 25, 1874,
508 and in force July 1, 1874, providing as follows: "All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

Question 14. Please identify the book to which you referred in answering the last question?

Answer. Hurd's Revised Statutes of the State of Illinois, 1893, being the same book to which I have heretofore referred.

Question 15. Please state what the law of the State of Illinois is as to the right to introduce evidence for the purpose of recoupment under the general issue, in an action of assumpsit?

Answer. The right to introduce evidence under the general issue, for the purpose of establishing a recoupment in an action of assumpsit, is unquestioned in Illinois. No special pleading of anything in the nature of recoupment is required. It is always admitted under the general issue.

Question 16. Where an action is brought by the plaintiff in assumpsit for the value of the work and labor performed, or services rendered, may the defendant under the general issue introduce evidence of any and all facts which would entitle him to damages against the plaintiff for negligence or wrongful manner of performing such services?

Answer. Yes sir.

Question 17. And may he have judgment in recoupment for such damages?

Answer. Yes sir,—that is to say, the law in this State is that all matters arising out of the same subject matter, all damages arising out of the same subject matter is any way may be shown under the general issue. No special pleading is necessary for that purpose.

509 Question 18. Suppose an action under the circumstances which I have detailed in my last question were brought, and the general issue pleaded, and the defendant had not introduced evidence for damages by way of recoupment, would his right of action be foreclosed in the adjudication?

Answer. It would, certainly. He must bring in his recoupment in that matter, or else he cannot maintain it in a separate action.

Question 19. Under the circumstances which I have detailed in the two last foregoing questions, could the defendant plead his damages which he should have pleaded by way of recoupment, as a set-off in any subsequent action upon the judgment obtained in the first action?

Answer. He could not. It would be *res adjudicata.*

Cross-examined by Mr. GATES:

Question 20. Mr. Cutting, in these last questions that have been asked you, you are speaking of recoupment?

Answer. I am.

Mr. MARTINDALE: Should any claim which a defendant might have for the wrongful manner in which legal services had been rendered, in a suit brought by the attorney for the value of his services, be anything else than recoupment under the laws of Illinois?

Answer. It would not.

Mr. GATES: That is to say, Mr. Cutting, that no matter what takes place,—no matter what services are rendered,—in an action against a client by an attorney for his services, any claim the client may have against the attorney would be a recoupment; is that what you mean to say?

Answer. Not that.

510 Mr. GATES: That question that you answered, I think would imply that?

Answer. Any damages that might be recoverable by a client against his attorney by reason of the malpractice—if you please—of the attorney would properly be recoupment in an action of this kind.

Mr. GATES: But it would not necessarily be—it might be—you can conceive of a malpractice which would not be recoupment, could you not?

Answer. Oh, I don't know, but I might conceive of such a thing, but I never met anything of that kind.

Mr. GATES: Of course, generally speaking you mean to say that they are generally recoupment?

Answer. I mean to say that that is the fact in the condition of circumstances which have been detailed to me in the questions

put in this case. They would properly be recoupments against the claim for services.

Mr. MARTINDALE: Suppose that attorneys were employed to represent an assignee under an assignment made for the benefit of creditors under the laws of the State of Illinois, and that they brought a suit against an assignee personally for the value of their services to him as assignee, and the general issue was pleaded, and judgment was rendered in favor of the attorney and against the assignee, or against the party who was assignee personally, for the value of the services, and in the suit upon that judgment an answer was pleaded seeking to recover as a recoupment against that judgment, against the attorney for misconduct in conducting the matters which were the subject of the original suit, in the particulars that they did not have an order of Court entered which would protect
511 the assignee against the personal liability for costs and expenses in the assignment, that they wrongfully advised him as to his rights in the premises as assignee, that they procured an order for the sale of the property which was the subject of the assignment, and at such sale, for the purpose of increasing the price of the sale, employed by-bidders to advance the price of the property, and that they bid themselves an increased price for the property at the assignee's sale: Would such right of action and such claims for damages be considered in this State recoupment against the action on the judgment?

Answer. They would certainly be considered recoupment in the original action between the parties, and should have been litigated there, but after the matter has proceeded to judgment, the whole affair would be *res adjudicata* under our law.

CHARLES S. CUTTING.

512 The said EDGAR B. TOLMAN, being first duly sworn, deposes as follows:

Examined by Mr. MARTINDALE:

Question 1. State your name, age, occupation and place of residence?

Answer. My name is Edgar B. Tolman; I am in my 36th year; I reside at 5660 Madison Avenue, Chicago, Illinois; I am by occupation a lawyer.

Question 2. You are a practicing attorney in the State of Illinois, County of Cook, and State of Illinois, are you not, Mr. Tolman?

Answer. I was admitted to the bar of Illinois in 1882, and have been practicing uninterruptedly in Chicago ever since that year.

Question 3. Will you kindly state what is the law of the State of Illinois in regard to joint obligations, as to wh-ther they are joint or joint and several?

Answer. I have in my hand the printed book of the Revised Statutes of Illinois, printed by authority of the Illinois Legislature, and Chapter 76 of this book, which I hold in my hand, is entitled "An Act to revise the law in relation to Joint Obligations." Section

3 of that Act reads as follows: "All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

Question 4. Is that statute now in force in the State of Illinois?

Answer. Yes sir.

Question 5. State what is the law of the State of Illinois in relation of the right of plaintiff in a civil suit to make amend-

513 ments, introducing new parties if necessary, etc.?

Answer. Referring to this same printed volume of the Laws of Illinois, turning to Chapter 110, what is known as the Practice Act, being entitled "An Act In Regard To Practice In Courts of Record, Approved February 22, 1872, In Force July 1, 1872;" Section 24 reads as follows (being Section 23 of the Original Act, and shown on page 1074 of this book which I have already identified, and which is Hurd's Edition, an edition published by authority of the General Assembly of Illinois): "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any matter, either of form or substance, in any process, pleading, or proceeding which may enable defendant to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense. The adjudication of the Court allowing an amendment shall be conclusive evidence of the identity of the action."

Question 6. And that Statute is still in full force and effect in the State of Illinois?

Answer. Yes sir, it is at the present time. This book which I have read from is a revision brought down to include the Acts of the last General Assembly, and all amendments thereof, and it is the law except so far as Statutes are and necessarily must be affected by judicial decisions construing them.

Question 7. I will ask you if this Statute has been construed by the Courts of the State of Illinois?

514 Answer. I remember once writing a brief on this question, and I therefore have had occasion to know that it has been construed many times. Here is one very short decision of the Supreme Court: I hold in my hand a Volume of the Decisions of the Supreme Court of Illinois, Volume 76, published by authority of the General Assembly of Illinois by Freeman, the official reporter of that Court, being the case of Cogshall *vs.* Beesley, the opinion beginning on page 445: This was an action of assumpsit, and a verdict was entered in favor of the plaintiff in that action, and after the verdict, and while a motion was pending for a new trial, a motion was also entered to amend the declaration and dismiss as to one of two joint defendants. The Court below allowed that motion, and overruled the motion for a new trial, and then entered judgment on the verdict. This action of the Court was assigned as error in the Supreme Court. The Supreme Court, in passing on that assignment of errors, say: "The decision of the Court in allowing the amendment to the

declaration, and the dismissal of the suit as to Francis S. Cogshall, is assigned as error. The amendment allowed by the Court was proper under the Practice Act," citing Revised Statutes of 1874, page 778, Section 24, which was and is the same as the statute which I have read.

Question 8. What is the statute of the State of Illinois in relation to amendments and jeofails? I wish to call your attention to the fourth and fifth subdivisions or paragraphs of Section 6.

Answer. Referring again to the same book, which I have already identified: Chapter 7 is the chapter of our statutes entitled "Amendments and jeofails," entitled "An Act To Revise The Law In Relation To Amendments And Jeofails, approved January 5, 1874, In Force July 1, of the same year. Section 6 of said Chapter
515 reads as follows: "Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the Court, or upon confession *nil dicit* or *non sum informatus*, or upon any writ of inquiry of damages, be reversed, impaired, or in any way affected by reason of the following imperfections, omissions, defects, matters, or things, in the process, pleadings, proceedings, or records, namely:" (Then follows the list, of which the fourth is as follows:) "For any variance between the original writ or process and the declaration, bill, petition, plaint, or demand." The fifth is as follows: "For any mispleading, insufficient pleading, lack of color, miscontinuance, or misjoining of the same, or want of a joinder of the issue."

Question 9. I ask you if that statute has been in force in this State for the last five years?

Answer. It has been uninterruptedly in force since July 1, 1874.

Question 10. And all the statutes which you have read, were they in force prior to and during the year 1893, in this State?

Answer. Oh yes, each one of them.

Question 11. What is the law of the State of Illinois where an action of assumpsit is brought against two defendants as to the right of the plaintiff to dismiss as to one of the defendants, and proceed against the other defendant as upon a several promise, under the statutes?

Answer. This: The plaintiff has the right to dismiss as to one of two defendants, whether they be joint defendants, or joint and several defendants, and to proceed as against the remaining defendant, or defendants, as upon a several promise, if there be only
516 one defendant left in the case, or as upon a joint and several promise if there be more than one defendant left in the case; and that right, as stated in the case of Cogshall *vs.* Beesley, has been declared to exist by the Supreme Court, even after verdict and pending motion for new trial. I am, however, clearly of the opinion that it is within the power of the Court to permit such action, even after judgment, in certain cases. I know of no case where the right so to dismiss is limited or does not exist, except in those actions where jurisdiction of the Court by statutes especially depends upon a certain one of different defendants, as for example, where an action is brought in one county against residents of different counties, and for

purposes of jurisdiction it is necessary that service be had in the county where the Court sits, on a person then residing or being within that county, after which process may go to any county in the State; then it is not possible to dismiss as against the person served in the county where the court sits without affecting the right of recovery as against the other defendants, but this is the only exception that I know to the rule.

Question 12. What is the law of the State of Illinois in relation to the right of a defendant who is sued in assumpsit for the value of work and labor performed, or services rendered, under the general issue to introduce evidence which would entitle him to recoup damages against the plaintiff for the negligence or wrongful manner in which he performed such services, or such labor?

Answer. All such matters are receivable in evidence under the general issue. In the case of Cook *vs.* Preble *et al.*, commencing on page 381 of Volume 80, of the Reports of the Decisions of the Supreme Court of Illinois, the opinion shows the following
517 facts: The action below was one of assumpsit for a derrick made by the plaintiff for the defendant, with its furnishings. The general issue was pleaded, and there was a special plea of set-off, which claimed damages from the plaintiff for the improper construction of the derrick, and for damages which resulted to the defendants from the defects, or alleged defects of the derrick. The trial court struck that plea from the record—the special plea—leaving the general issue to stand. The striking out of the special plea was alleged as error. The Supreme Court say that it was not error, because all the matters alleged under the special plea could have been heard under the general issue. On that point I quote from the language of the decision. "That the damages set out in that plea could be recouped under the general issue has been settled by this court in a number of cases cited by defendant in error. Higgins *vs.* Lee, 16 Ill. 495; Babcock *vs.* Price, 18 Same, 420; Crabtree *vs.* Kile, 21 Same, 181; Mears *vs.* Nichols, 41 Same 201."

This decision was at the December Term, 1875, and in the 131st Illinois, in the case of Underwood *vs.* Wolf, page 435, this same doctrine is restated, and there is no question whatever that that is the law of the State of Illinois. There are no dissenting opinions or contrary views expressed.

Question 13. Suppose, then, that an action is brought by an attorney at law in the State of Illinois against a person who was the assignee under a general assignment for the benefit of creditors for services which the attorney at law had rendered to the assignee; suppose that the general issue was pleaded, and a trial had, and that a judgment was rendered against the defendant personally in favor of the plaintiff, and that afterwards the plaintiff brought suit upon his judgment in another court against the judgment defendant,
518 and the judgment defendant in this second suit pleaded that the attorney had so wrongfully and negligently discharged his duty as his attorney as to cause him damage; that by failing to have a proper order entered in the assignment proceedings which would protect the assignee from personal liabilities for costs and ex-

penses; that by giving him wrong advice as to his rights and remedies; that by having an order entered for the sale of the property included in the assignment, at which sale the attorney bid himself, for the purpose of advancing the purchase price of the property, and employed by-bidders to "puff" the price of the property at the sale; whereby and by reason of all which, the judgment defendant suffered damages: Would the subject matter of this answer, which I have just stated, and all of these alleged acts of misconduct of the attorney, be the proper subject of recoupment under the general issue in the first suit, and would the judgment defendant be entitled in the second suit to plead the same by way of defense, or by way of recoupment or counter claim?

Answer. Let me ask you a question, so that I may be sure that I understand your question. Do I understand you to say that this assignee, the judgment in the first suit, and the defendant in the second suit on the judgment, claims that he is damaged by efforts which his attorneys made to secure a higher price for the sale of the assets of the estate?

Question 14. Yes, that among other causes of damage.

Answer. I am unable to understand how an assignee, whose duty it is to dispose of his trust estate at the best possible price, could be damaged by any efforts made to secure the highest possible price for those assets.

Question 15. But would the subject matter be included under the general issue in the first case?

519 Answer. Anything upon which a claim that the services sued for were not of benefit, or were a damage to the defendant, would be admissible under the general issue in the suit for the value of the services; and further answering your question, the principle would apply that the adjudication in the suit for services would embrace not only those matters which were actually litigated, but all matters which might have been litigated under the issue made by the pleadings. They would, therefore, be *res adjudicata*. There would be an estoppel by judgment to relitigate those issues, whether they were tried or not,—that is to say all issues which were tried, and which might have been tried under the pleadings, and therefore, under the laws in this State, such pleas to an action on the judgment would not be good. I understand, and base my testimony on this understanding: that these claims for damages are for alleged damages said to have arisen before the recovery of the judgment.

EDGAR B. TOLMAN.

Mr. MARTINDALE: I want to introduce in connection with the testimony of Mr. Tolman, copies of those Sections of the Revised Illinois Statutes which he has read. I refer to the following Sections: Section 3 of Chapter 76, Hurd's Revised Statutes of the State of Illinois for 1893 entitled "An Act To Revise The Law In Relation To Joint Obligations"; Section 24 (being Section 23 of the original Act) of Chapter 110, "Hurd's Revised Statutes of The State of Illinois for 1893" entitled "An Act In Regard To Practice In Courts Of Record Approved February 22, 1872, In Force July 1, 1872" Page 1074

and Section 6 of Chapter 7, "Hurd's Revised Statutes of The State of Illinois for 1893" entitled, "An Act To Revise The Law
520 In Relation To Amendments and Jeofails, Approved January 5, 1874, In Force July 1, 1874," and the Fourth and Fifth Subdivisions of said Section 6, and mark said copies "Exhibit 1," and "Exhibit 2", and "Exhibit 3" respectively.

521 "EXHIBIT 1."

(Copy.)

CHAPTER 76.

Hurd's Revised Statutes of the State of Illinois, 1893.

"An Act to Revise the Law in Relation to Joint Rights and Obligations. (Approved February 25, 1874. In force July 1, 1874.)"

Illinois Statutes.

3. SECTION 3. All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants.

522 "EXHIBIT 2."

(Copy.)

CHAPTER 110.

Hurd's Revised Statutes of the State of Illinois, 1893.

"An Act In Regard To Practice In Courts of Record. (Approved February 22, 1872. In Force July 1, 1872.)"

Illinois Statutes.

24. SECTION 23. At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense. The adjudication of the Court allowing an amendment shall be conclusive evidence of the identity of the action.

523 "EXHIBIT 3."

(Copy.)

CHAPTER 7.

Hurd's Revised Statutes of the State of Illinois, 1893.

"An Act to Revise the Law in Relation to Amendments and Jeofails. (Approved Feb. 25, 1874. In Force July 1, 1874.)"

Illinois Statutes.

6. SECTION 6. Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the Court, or upon confession *nil dicit* or *non sum informatus*, or upon any writ of inquiry of damages, be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings, or records, namely:

Fourth (Subdivision)—For any variance between the original writ or process and the declaration, bill, petition, plaint or demand.

Fifth (Subdivision)—For any mispleading, insufficient pleading, lack of color, miscontinuance, discontinuance, or misjoining of the issue, or want of a joinder of the issue.

524 *Notary's Certificate.*

STATE OF ILLINOIS, *County of Cook, ss:*

I, Robert G. Hall, a Notary Public within and for the County of Cook and State of Illinois aforesaid, do hereby certify that the above named Charles S. Cutting and Edgar B. Tolman were by me first duly sworn according to law, to testify the truth, the whole truth and nothing but the truth, relating to said cause; that their depositions were reduced to writing by Sarah Barnet, a disinterested person, in my presence and under my direction; that the said defendant, Harry B. Gates, attended by Edward E. Gates, his attorney; and that said depositions were taken at Room 802 Chamber of Commerce Building, in the City of Chicago, County of Cook, and State of Illinois, on the 16th day of January, 1895, between the hours of 10 and 11:30 A. M. of said day, by agreement of all the parties to said cause.

In testimony whereof, I have hereunto set my hand and Notarial Seal this, the 21st day of January, 1895.

ROBERT G. HALL,

[NOTARIAL SEAL.] *Notary Public in and for the County of Cook and State of Illinois Aforesaid.*

525 *Clerk's Certificate.*

STATE OF ILLINOIS, *Cook County, ss:*

I, Philip Knopf, Clerk of the County Court of Cook County, the same being a Court of Record, Do hereby certify, that Robert G. Hall, Esq., whose name is subscribed to the certificate to the annexed deposition, was, at the time of signing the same, a Notary Public in and for Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths, and take depositions; that I am well acquainted with his handwriting, and I verily believe that the signature to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Chicago, in said County, this 25 day of January 1895.

[L. S.] PHILIP KNOPF, *Clerk.*

526 STATE OF INDIANA, *Marion County, ss:*

In the Superior Court of Marion County.

JACOB NEWMAN, GEORGE NORTHRUP, JR., and S. O. LEVINSON
vs.
HARRY B. GATES.

Complaint No. 46388.

The defendant in the above entitled cause is hereby notified that on the 16th day of January 1895, at the office of Newman & Northrup, Rand and McNally Building in the City of Chicago Illinois in the County of Cook and State of Illinois between the hours of 8 o'clock A. M. and 6 o'clock P. M. of said day, before some officer authorized to take depositions, the plaintiff will proceed to take the depositions of Charles S. Cutting, Wm. Manning and Edgar B. Tolman, witnesses to be used in evidence on the trial of said cause, and will, if necessary continue said taking from day to day until said depositions are completed.

Dated this 11th day of January 1895.

CHARLES MARTINDALE,
Attorney for Plaintiff.

We acknowledge service of the above notice and waive dedimus and Certificate of official character of officer before whom said depositions are taken this 11th day of January, 1895.

BAKER AND DANIELS.
E. E. G.,
Attorney for Defendant.

527 Whereupon the hour of twelve o'clock having arrived the Court took recess until two o'clock P. M.

2 O'CLOCK P. M.

The Court met pursuant to adjournment.
Present the same as before recess.
The hearing of the evidence was resumed as follows:

SOLOMON O. LEVINSON, One of the plaintiffs, examined as a witness for the plaintiff, being first duly sworn, testified as follows:

Examination in chief.

Questions by WILLIAM A. KETCHAM, ESQ.:

Q. Will you state to the Jury your name?
A. Solomon O. Levinson.
Q. Your age?
A. I will be thirty-four this month.
Q. Your residence?
A. I reside in Chicago Illinois.
Q. Your profession?
A. Attorney.
Q. How long have you been an attorney?
A. About eleven years. I think I was admitted, however,
528 in 1890, or 1891, so that I have been a licensed attorney about eight years or nine years.
Q. How long have you lived in Chicago?
A. I have lived there continuously since January, 1889; I had been there prior to that time.
Q. Before that where had you lived?
A. Before that time I had lived since my birth twenty miles north of here at Noblesville, Indiana, where I was born.
Q. Up to 1889?
A. Up to 1889 except the time when I was away at school.
Q. You are one of the plaintiffs?
A. Yes sir.
Q. When were you admitted into the firm of Newman and Northrup?
A. When it was organized; that was on the first of March, 1892; in 1894 the firm was changed to Newman, Northrup and Levinson, and there is a fourth member.
Q. But from 1892 continuously you were a member of the firm?
A. Yes sir.
Q. And therefore were a member of the firm during the time these matters were in existence?
A. Yes sir.
Q. Now, I will get you to state to the Jury when and what conversation you had or were present at in connection with any member of the firm, between yourself or your firm and the defendant Mr. Gates, at which the subject of attorneys' fees were first mentioned.
A. That involves saying that the question of attorneys' fees was

never mentioned by any one, that is, I mean either Mr. Gates or myself, until the letter introduced in evidence here was written by our firm to him, which I think was in the latter part of March, 1893.

529 Q. Up to that time, then, if I understand you, you yourself had personalty no conversation with Mr. Gates on the subject of attorneys' fees nor had you been present at any time when any member of your firm had talked with him in the subject?

A. That is correct. I had—I knew who the firm of A. B. Gates & Company were, and they were well introduced to us and we did not bother them about a retainer, or any fees.

Q. Now, I will call your attention to an order entered in the County Court, of Lake County, on the 25th of November, 1892, the order being as follows: "Reading and filing the petition of Harry B. Gates assignee herein, it is ordered by the Court that said assignee may pay and he is hereby authorized to pay the sum of about three hundred dollars to tug men and laborers on the tug H. S. Sill, belonging to said estate; and he is further hereby authorized to employ such help as may be necessary in the care, conduct and management of said estate until the further order of this Court." Q. I will ask you if you were present at the time that order was made by the Court?

A. I was. I drew the order, myself.

Q. Who was present with you?

A. Mr. Gates the assignee.

Q. Now, I will call your attention to a conversation between the City of Chicago and the City of Waukegan between yourself and Mr. A. B. Gates, and get you to state to the Jury whether at that time in connection with discussing that order anything had been said by Mr. Gates to yourself, or anything by yourself to him, on the subject of attorneys' fees, and if so what was said?

A. Nothing at all.

Q. For what purpose or on what account were you and Mr.

530 Gates making that trip from Chicago to Waukegan at that time?

A. As I remember it, in order to get possession of the tug belonging to the Mortar Company, of which I think some laborers had possession claiming back pay.

Q. And in connection with getting the possession what was it necessary to do?

A. We were compelled to pay the arrears of wages to the laborers on the tug.

Q. And in making that payment what, if anything, was it necessary to do in Court?

A. To procure an order in advance authorizing the payment of the moneys. I will add that I advised Mr. Gates that these laborers had a lien by reason of their being laborers' claims, and that he could safely advance the money on the order of the Court because they had to be paid anyway as a first lien.

Q. Now, as you recall it what, if any other subject of conversation, upon that trip from Chicago to Waukegan, was there be-

tween you and him as you now recall other than the claims upon the tug and the order necessary to be made in respect thereto?

A. Well, it was seven years ago; we might have discussed other matters, but nothing of importance relating to the American Mortar Company's affairs except possible insurance, in addition to the tug matter.

Q. Now, I will ask you to come down to the time when you say the question of attorneys' fees between you was broached by this correspondence. Was there any other correspondence on the subject of attorneys' fees than that that was introduced here yesterday.

A. Well none before that. There might possibly be another letter but I do not recall any.

Q. Now, after the writing of those letters and the receipt of them, was Mr. Gates at any time in your office, and if so when?

531 A. I think the only time Mr. Gates was in our office after those *m*etters were written was on the 17th day of April, 1893.

Q. If at that time there was any conversation on the subject of attorneys' fees, or on the subject of orders of Court with respect to attorneys' fees, anything upon that general subject, you may state to the Jury—either of attorneys' fees, or of an order?

A. What kind of an order do you refer to?

Q. An order with respect to attorneys' fees, an order of Court.

A. Well, the subject of attorneys' fees was discussed on that day.

Q. Then just state to the Jury, as nearly as you can now recall it, what took place in that discussion?

A. Well, the friendly names suggested by Mr. Gates, "Two Hundred Dollar Man" and "Two Thousand Dollar Man" were used. I recall referring to the letters between Mr. Gates and Mr. Newman of our firm, and my recollection is that Harry Gates and I went somewhere, away from the office, and came back and met Mr. Newman at the entrance about noon. I recall that from another circumstance in connection with it that Mr. Gates knows about—that has nothing to do with this case—*a*nd we three went upstairs together and went into my room, Mr. Newman and Mr. Gates and myself. We there had some discussion about attorneys' fees, Mr. Newman saying that he did not want to quarrel with his clients about fees, and that we wanted to do the right thing and thought Harry did, and we would talk it over and see if we could not agree upon an amount which he should pay; that we had not troubled them heretofore with any bills for retainer, relying upon them, and that we ought to get to-

532 gether and agree upon an amount. Then we went to lunch, we three and possibly Mr. Becker, who is the junior member of our firm—I am not clear about that—about half past twelve or one o'clock, and the discussion continued there. Among other things that I recall Mr. Newman's saying at lunch to Mr. Gates, after having said that he would take fifteen hundred dollars, or thirteen hundred dollars, to show his good faith in the matter he said he would be willing to leave it to Mr. Gates, and whatever he would say was right, his honest opinion, we would be satisfied with and accept as our fee. Mr. Gates replied that he was not familiar with attorneys'

fees and that he did not consider it fair that he should fix them; that he wanted to do what was right, but did not know exactly what would be right; and there was some further conversation of not a very different character from that. That is about what I remember occurred on this subject on that day. Well, something further occurred later.

Q. I want all that occurred on that day.

A. Well, Mr. Gates went away, I think he was to see Mr. Condit. He said Mr. Condit had bought or was about to buy his father's mortgages. I think either Mr. Condit or Mr. Gates had a telegram on that day from Indianapolis from A. B. Gates on the subject to the effect that the sale had been consummated, or would be; and he was to return to the office from there after he had consulted with Mr. Condit; he was to come back for two purposes, one relative to our fees, the adjustment of them, and secondly, to confer with us about the sale, the manner of its conduct, and so forth. The sale was to take place the next day. We waited until I think five o'clock or so and Mr. Gates did not come back, and along late in the afternoon—

533 I cannot say just what hour—Mr. Gates telephoned saying that he was down there and would not be able to come up to the office, and he would go direct to Waukegan; and that was the particular fact on that day, his failure to come back, that led us to infer——

Q. I don't care what you inferred. I am not asking you for that. Well, did that end the conversation between you and Mr. Gates on that day on the subject of fees?

A. I think that would about cover it.

Q. You have given, as near as you recall, all that transpired on that day on that subject?

A. Yes sir; of course we must have said more than I have said, but I think I have given the substance of it.

Q. If there is anything else that you recall——

A. I do not recall anything else, Mr. Ketcham.

Q. Then did you go to Waukegan next morning?

A. I did.

Q. What time did you start and what time did you get there?

A. I went on an early train, but I am not sure, I think it was 8:30 A. M. I left Chicago; something about like that.

Q. Was Mr. Gates on the train with you?

A. Oh, no.

Q. When and where did you first see him on that day?

A. I believe that is the day of the sale, the 18th of April—was it?

—. ——.

A. The 18th of April, 1893.

Q. When and where did you first see him?

A. My recollection is that I did not see him until at lunch or dinner at the hotel, noon time.

Q. Was that before the sale or after the sale?

A. Before. I think the sale was one o'clock.

Q. State whether at that time you had any conversation on the subject of attorneys' fees *of* so you may state.

A. You mean during the day of the sale?

534 Q. At this time when you saw him at lunch or dinner?

A. I think not.

Q. Whether at that time he consulted with you or you gave him any advice in regard to the sale you may state.

A. No, I did not consider myself his attorney.

Judge WALKER: May the Court please I move to strike that out.

The COURT: That may go out, "I did not consider myself his attorney" may go out.

Q. Simply state what you did, Mr. Levinson?

A. Well, this little conversation on that subject occurred I think at the lunch table.

Q. If there was any conversation, or any advice given to him before going to the sale while you were at lunch you may state to the Jury if you remember any?

A. Mr. Ketcham, I don't know whether I would call it advice—I can tell you about what I remember was said.

Q. Then the jury will be able to say whether it was advice or not; you tell what was said.

A. My recollection is that was about half past twelve of that day, and Mr. Gates said: "What do you think I had better do about this sale, conducting the sale?" I replied, "Mr. Gates, I don't think you need my advice; I think you probably have all the advice on the subject that you need." I said: "Are you going to have the sheriff sell the property?" He replied: "No, I am going to sell it myself." I said to him "I think you had better have the sheriff sell it; the cost will be nominal, and he would be an impartial person and acquainted with parties here who may bid and can judge of their financial responsibility, and he would be well known and
535 the customary person to conduct sale." He replied: "No, I am going to sell this property myself."

Q. That is all the conversation that took place then at the hotel?

A. That is all that I recall. We didn't talk very much.

Q. Then after dinner or lunch you may state whether you went to the place where the sale was to take place?

A. Yes sir, we went immediately from the lunch table, or dinner table to the place of sale on the east side of the Court House.

Q. Did you go together?

A. No sir; we were not on pleasant terms then.

Mr. DANIELS: May the Court please, the defendant moves to strike out the last sentence of that answer as not responsive to the question.

The Court overruled the objection; to which ruling the defendant by counsel at the time excepted.

Q. Now, when you got to the sale who was there that you recall?

A. Well, Mr. Ketcham, I cannot distinguish between a person who may have come up within five or ten minutes; I saw at the sale among others the following persons: Mr. Whitney, of the law firm of Whitney and Upton; Mr. Gates, the assignee; Mr. Condit and Mr. Hussey, who have been on the stand here, and Mr. O'Brien, I think, and Mr. Gaffney and Mr. Howard and Mr. Burwin, and I think the sheriff was there and then some citizens of Waukegan—Oh, yes, and Mr. Long; and I think likely some of the attorneys of Waukegan who were interested.

536 Q. Now, from the time you went to the sale until the final bill was accepted how much time elapsed?

A. Well, I think the sale began at one o'clock; I probably got there a few minutes before, and my recollection is that before the final bid was made and the property struck off that day to the last bidder, it was after 2 o'clock.

Q. Then it was something in the neighborhood of an hour, something over an hour?

A. I think in that neighborhood.

Q. Now, I will ask you, what if any advice at any time in connection with that sale Mr. Gates asked of you.

A. None.

Q. What if any advice at the time of the sale did you give to Mr. Gates, whether asked or not?

A. You mean by advice lawyer's advice, or make a statement to him?

Q. What advice did you give him?

A. I gave him no advice as his attorney. I made a statement to him in the progress of the sale that might in one view be considered my view of what he ought to do, or ought not to do.

Q. If you *have* him a statement that might be considered your view as to what he ought to do, or ought not to do will you tell the Jury what that statement was?

A. Mr. Gates acted as his own auctioneer and announced the property for sale to the bidders; he mentioned in detail these various mortgages and liens on the tug and footed them up, giving the aggregate amount, and told the bidders that they would take the property subject to those liens and each of them, and that they must pay off all those liens in case they purchased the property. I recall having stated to Mr. Gates in the presence of the bidders and in the

537 hearing of the bidders that I did not consider it proper to be giving so much prominence to the liens; that we wanted to get the best price for the property, and that as I understood it the sale would be subject to those liens and those only that were valid, and that it was very doubtful whether some of the liens under the law of Illinois were valid liens, and therefore it might or might not be subject to the number of liens mentioned by the auctioneer, the assignee, and I protested there with him against his stating as he did to the bidders these liens and their amount because I said I did not consider them liens, all of them liens, valid liens.

Q. Now, you may state to the jury whether that statement that you made to him, or that suggestion that you made whether to him or to others, was made in response to a request by Mr. Gates to you that you should express any opinion upon that subject, or how you came to make that statement?

A. Mr. Gates did not then or at any time, during the sale, ask me any questions or for any advice. That statement was elicited by his method of proclaiming or offering the property to the bidders, which I said to him was in my judgment unfair, and tended to depreciate the value of the property.

Q. If at any time during the progress of that sale you observed Mr.

Gates consulting with any lawyer other than yourself you may state and who such lawyer was.

Judge WALKER: Do you mean consulting, or do you mean talking to somebody else?

Mr. KETCHAM: I mean consulting.

Judge WALKER: Then, may the Court please, I will object to the question. He could hardly stand off and look at a man and
538 say he was consulting a lawyer unless he heard what was said.

The COURT: Consulting is a somewhat ambiguous term unless the witness overheard what was said, if he only saw him talking to him. A consultation with a lawyer usually means legal advice.

Q. Did you see Mr. Gates in connection with that sale, at the time that sale was being cried, having any concersation with any lawyer?

Judge WALKER: May the Court please, I object to that question on the ground that it contains the statement "In connection with the sale." If he wants to say "At the time of the sale" and not "In connection with the sale" I have no objection, unless the witness is going to say and Mr. etcham is going to show what was said; and I object on the further ground that there is no pretense that this witness heard what the conversation was, and the question presupposes that he did.

The Court overruled the objection; to which ruling the defendant, by counsel at the time excepted.

A. My answer to that would be yes.

Judge WALKER: If your Honor please, I move to strike out that answer for the reasons given in objection to the question.

The Court overruled the motion to which ruling the defendant by counsel at the time excepted.

539 Q. With whom did you see him, with what lawyer did you see him in connection with that sale?

The COURT: If you mean by that to say that the conversation was in connection with the sale I will sustain the objection.

Mr. KETCHAM: The question is not susceptible of that construction.

The COURT: Then the jury will understand.

Q. With what lawyer at the time of the sale did you see Mr. Gates conversing?

A. With Mr. Whitney of the law firm of Whitney and Upton of Waukegan.

Q. You may state to the jury whether the conversation that took place between Mr. Gates and Mr. Whitney at that time was such a conversation as that you could hear, or whether it was one that you could not hear and did not hear?

A. Well, I am inclined to think, I know in fact I did not hear all of it. The conversation I have particularly in mind is this——

Q. I haven't come to the point of asking that yet. If you heard any of it is what I want to get at first.

A. I was probably ten or twenty feet away, and probably did not hear it.

Q. Did you hear any part of it?

A. Not unless you would call this a part of it, and I was about to state the circumstances—I am not clear whether you would consider this a part of the conversation or not.

Q. Then I will put it this way: Did you hear Mr. Gates say anything to Mr. Whitney, or did you hear Mr. Whitney say anything to Mr. Gates?

540 A. I heard Mr. Gates say that he wanted to confer with his attorney, and stepped to one side and talk- with Mr. Whitney. I am inclined to think that I did not hear the conversation between them.

Q. Now, after you had heard Mr. Gates say that he wanted to confer with his attorney what conversation did you have with him?

A. None.

Q. Following that with whom other than Mr. Whitney did he have any conversation?

A. The only one I noted with *with* Mr. Whitney.

Q. Now, *at* what has been spoken of here in the presence of the jury as the second sale you say state to the jury if you yourself were a bidder?

A. I was.

Q. After the sale yere you at any time present with Mr. Gates in the office of Mr. Whitney, or of Whitney and Upton?

A. Yes.

Q. When?

A. I think it was immediately after the sale, the sale to me.

Q. You may state to the Jury whether you went to the office of Whitney and Upton at the request of or at the suggestion of Mr. Gates, or whether you went there of your own motion, or how you went there.

A. The occasion of going there was to procure a bill of sale from the assignee covering the property included in the sale. Mr. Whitney was to draw up a bill of sale for Mr. Gates, and I think he went with Mr. Whitney to his office.

Q. Where was Mr. Gates when you and Mr. Whitney were going to Mr. Whitney's office? Was he with you?

A. I don't think he was with me in the sense of walking by my side, but I think we all went up there at about the same time

541 Q. Now, in the office of Mr. Whitney you may state to the Jury whether any conversation took place on the subject of your relations to Mr. Gates, and if so will you tell the Jury what that conversation was?

A. We did not have much conversation. I recall stating to Mr Gates that he had in effect discharged us as his attorneys; that he had not returned to the office the day before, had not conferred with us about the sale and it was evident from his conduct at the sale and his conferring with Mr. Whitney that we had ceased to represent him.

Q. What did he say to that?

A. He replied a little hotly, I think.

Judge WALKER: Never mind how warm it was; tell us the words.

The WITNESS: Something to this effect, that he considered that we had abandoned him as much as he had discharged us.

Q. Was that all the conversation that you had with him on the subject of the relations of attorney and client—if there was anything else I wish you would state it.

A. That is all I recall.

Q. If at any time thereafter Mr. Gates consulted you or had any conversations with you with respect to his relations to this Trust you may state when and where such consultations or conversations took place, and when it was.

A. Never had any of any kind.

Q. Whether at any time after this meeting at Whitney and Upton's office you received any letters or any oral request or direction from Mr. Gates in regard to what you should or should not
542 do for him as attorney, will you state to the Jury what took place at the time any such direction or request was made?

A. I never received any; never conferred with Mr. Gates or had any correspondence with him or did anything for him, as assignee or otherwise, after the seventeenth day of April, 1893.

Q. Now, I will call your attention to the record of the Lake County Court in which this assignment was pending to the order made on the 26th day of April; you are familiar with that order, the order setting aside the sale?

A. That is 1893.

Q. Yes sir.

A. Yes sir.

Q. I will get you to state who was present in Court at the time that order was made.

A. That is the order setting aside the sale finally?

Q. Yes sir.

A. Mr. Whitney representing Mr. Gates and Mr. Gates; Mr. Newman representing me, and myself and Judge Clarke. It occurred in Chambers.

Q. Now at that time I will get you to state to the Jury whether or not Mr. Whitney in those proceedings on that day appeared as attorney for yourself, or for yourself and Mr. Newman?

A. Not at all. On the contrary he opposed our motion.

Q. For whom in that matter before the Court did Mr. Whitney appear?

A. He appeared for Mr. Gates the assignee.

Q. Now what had transpired on that day immediately or shortly before the application to set aside this sale with respect to the sale, or the property.

A. May I ask whether you refer to the action of the setting
543 aside of the sale?

Q. No, before that time, what happened before that time with reference to the property itself, or the sale of the property, or the delivery of the property?

A. I think it was the day before, it may have been the day before

the 26th of April when this order was entered, it may have been two or three days, but very shortly before Mr. Newman and I went up to Waukegan to meet Mr. Gates and Mr. Whitney and get possession of the property and pay the balance of the purchase price. We went into the bank at Waukegan, the First National Bank, and we had paid I think five hundred dollars, earnest money, or advance money and owed a balance of twenty-four hundred dollars; we had a draft, or the bank gave us a draft—the bank knew us—for twenty-four hundred dollars in favor of Mr. Gates; but we said to Mr. Gates, I do not recall whether Mr. Newman said it or whether I did—we were there together—that we would leave the draft for twenty-four hundred dollars with the president or the cashier of the bank to be delivered to Mr. Gates as soon as we got possession of the property, the property being a short distance outside of Waukegan; I think Mr. Gates wanted the money but I think that was finally agreed to and the draft was left with this bank official.

Judge WALKER: Was that the day of the sale?

Mr. KETCHAM: No sir, the day before, or second day before the 26th when the sale was set aside.

Q. Then what did you do?

A. For some reason or other I don't remember whether I went out with Mr. Newman and Mr. Gates to take possession of
544 the property or not, I am not clear on that, I think I did. The difficulty was we went out there and met armed resistance, somebody was in possession of the property and made a motion as if to draw a revolver, with his hand back like that (Illustrating), when we tried to get in to take possession; he said he was there representing the mortgagee, Mr. Condit, and he would not let anybody have possession or let anybody inside.

Q. Well, you didn't get possession?

A. Not at all.

Q. Did Mr. Gates go out—state whether he went out with you and Mr. Newman, or with Mr. Newman?

A. Yes sir, he went along.

Q. Then it was after that time as I understand you that this order was made setting aside the sale?

A. Yes sir. On that account. We petitioned the Court. We did not know that the property had been taken from the assignee until then.

Q. When did you first learn that the possession had been taken by the mortgagee?

A. Not until we went out with Mr. Gates on that day. I would like to add a little something there.

Q. If there is any explanation you desire to make of anything that you have been inquired about you may do so.

A. I was going to say that this mortgagee, Mr. Condit, had filed objections to the confirmation of the sale to me, and had appeared in Court.

Q. I think that appears from the record here.

A. I was just going to state, we had no reason to believe he was in possession because he was in Court.

Q. Something has been said somewhere in this evidence about a purchase or an agreement by Mr. O'Brien to purchase from
545 you or from Newman and Northrup your bid, and his giving perhaps a thousand dollars mor-. What was the fact in regard to that, and what was done with reference to it, and when was it done?

A. Mr. O'Brien accosted me on the train returning to Chicago from the sale and wanted to know whether he could buy the property from me, and I told him I presumed he could, we didn't yet have the delivery of it, the sale was not closed up, it had not been confirmed by the Court, nor the property delivered, but I knew of no reason why we could not sell it to him; if he would go along with me up to the office we could talk the matter over when we got to Chicago, which I think we did, and I am inclined to think, too, Mr. Gaffney and Mr. Long were along; there was some sort of a partnership.

Q. Now, as a matter of fact after that time, or in connection with that, state whether you did make an agreement to sell to Mr. O'Brien your purchase, and if so upon what terms?

A. We made an agreement with Mr. O'Brien, and I think these other two parties, Mr. Gaffney and Mr. Long—being just one firm—to sell the property, or rather they agreed to buy it from us, or from me, for an advance of I think nine hundred dollars, over and above what we paid for it, as soon as we could get possession of the property, and on condition that we got possession of it and delivered possession to them. As appeared by the transcript of the evidence at the time of the trial Mr. O'Brien *dissolved* from his firm, withdrew half of his money, and later on we paid over the other half back.

Q. For what reason?

A. Because we could not get possession, and that was the condition upon which we were to resell it to them; so that the money was returned. I wanted to say that I happened to think of
546 something that I did want to speak of that I omitted from the conversation at the hotel between Mr. Gates and myself.

Q. Go on.

A. Mr. Gates told me at that hotel conversation at noon on the 17th——

Judge WALKER: Is it at the day of sale?

The WITNESS: Yes sir, the day of the sale—that he was afraid the property would not bring enough to pay what moneys he had advanced, or paid out. He said "how am I going to get reimbursed? This property I am afraid will not bring enough to pay me my expenses." I think he said his expenses were something like eight hundred dollars as assignee, and I think I said on that occasion that he could allay his fears, that if he would give me twenty five dollars I would guarantee that the sale would bring enough to pay the eight hundred dollars. I said that rather jokingly.

Witness excused; and the plaintiffs rest.

And this was all the evidence given in said cause.

547 *Official Reporter's Certificate.*

STATE OF INDIANA, *County of Marion, ss:*

I, William S. Garber, Official Reporter of the Superior Court of Marion County, Indiana, duly appointed and qualified, hereby certify, That upon the trial of this cause, wherein Jacob Newman, George Northrup and S. C. Levinson are plaintiffs and Harry B. Gates is defendant, I took down in shorthand all of the oral evidence given, including both questions and answers, and the documentary evidence, and noted all of the objections made to the admission of evidence, the rulings of the Court as to the admission and rejection of evidence, and the exceptions taken thereto; that having been requested by the plaintiffs to furnish them with a typewritten transcript of all of said proceedings, so taken and noted by me, including all documentary evidence, I prepared the foregoing transcript, and hereby certify that said transcript contains all the evidence given in said cause, so taken by me upon said trial, at the time and place aforesaid.

Dated Sept. 23, 1901.

WILLIAM S. GARBER,
Official Reporter Superior Court of Marion County, Indiana.

$206.35. SEPT. 20, 1901.

Received of Newman, Northrup & Levinson, Two Hundred and six and 35/100 Dollars in full for Foregoing Transcript.

GARBER & CARPENTER.

548 *Judge's Certificate.*

STATE OF INDIANA, *County of Marion, ss:*

I, John L. McMaster, Judge of the Superior Court of Marion County, State of Indiana, do hereby certify that the foregoing transcript, made by William S. Garber, Official Reporter, is correct, and contains all the evidence given in said cause. This September 23rd, 1901.

JOHN L. McMASTER,
Judge Superior Court, Marion County, Indiana.

549 *Clerk's Certificate.*

STATE OF INDIANA, *County of Marion, ss:*

I, George B. Elliott, Clerk of the Superior Court of Marion County, State of Indiana, do hereby certify that the foregoing Typewritten Transcript was filed in my office by William S. Garber, Official Reporter of said Court, on the 23 day of Sept. 1901.

[SEAL.] GEO. B. ELLIOTT, *Clerk.*

550 And this was all the evidence given in said cause.

And be it further remembered that on this twenty-fifth day of September, A. D. 1901, the same being the twenty-fourth judicial day of the September Term, 1901, of said Superior Court of Marion County, and within the time given the plaintiffs within which to file their Bill of Exceptions, Jacob Newman and S. O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, now in open Court tender to the Honorable John L. McMaster, Judge of the Superior Court of Marion County, Indiana, this, their Bill of Exceptions, No. 2, and ask that the same be signed and sealed and made a part of the record in this cause.

And now on this twenty-fifth day of September, A. D. 1901, the same being the twenty-fourth judicial day of the September Term, 1901, of the said Superior Court of Marion County, Indiana, the said the Honorable John L. McMaster, Judge of the said Court, now here signs and seals said Bill of Exceptions and does order that the same be filed and made a part of the record in this cause.

JOHN L. McMASTER,
Judge of the Superior Court of Marion County, Ind.

(Filed Sept. 25, 1901.)
GEO. B. ELLIOTT, *Clerk.*

551 *Clerk's Certificate.*

STATE OF INDIANA, *County of Marion:*

I, George B. Elliott, Clerk of the Superior Court within and for the County aforesaid, do hereby certify that the foregoing transcript of the record in Cause No. 46,388, in said Court, wherein Jacob Newman, George W. Northrup, Jr. and S. O. Levinson were Plaintiffs, and Harry B. Gates was defendant, contains full, true and complete copies of all of the entries of proceedings had and of all the papers filed in the said cause, in said Court; (except that the long-hand transcript of the Evidence as embodied in the Bill of Exceptions, No. 2, herein, is the original and identical Long hand Transcript of the Evidence filed in my office on September 23rd, 1901, by William S. Garber, Official Reporter; that the Bill of Exceptions No. 2 contained herein, is the original and identical Bill of Exceptions No. 2 containing the evidence given in the said cause, which was examined, signed and allowed by the Court and filed in said cause on the 25th day of September 1901,) as appear from the Records and Files of said Court, now in my custody.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Superior Court, the 11th day of October, A. D. 1901.

[SEAL.] GEO. B. ELLIOTT, *Clerk.*

552 (Filed Mar. 17, 1902. R. A. Brown, Clerk.)

In the Appellate Court of Indiana, Division Number Two.

JACOB NEWMAN and S. O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson, Appellants,

vs.

HARRY B. GATES, Appellee.

Assignment of Errors.

The appellants aver that there is error in the proceedings and judgment in said cause, in this:

1st. The Court erred in over-ruling the appellants' motion for judgment in their favor, notwithstanding the verdict of the Jury.

2nd. The Court erred in over-ruling appellants' motion for a new trial.

WILLIAM A. KETCHAM,
CHARLES MARTINDALE,
Attorneys for Appellants.

553 In the Appellate Court of Indiana, May Term, 1902, Appellate Division No. 2.

No. 4386.

JACOB NEWMAN ET AL., Surviving Partners, &c., Appellants,

vs.

HARRY B. GATES, Appellee.

Amendment to and Additional Assignments of Error by Appellants.

The said appellants, Jacob Newman and Salmon O. Levinson, who are surviving partners of the late firm of Newman, Northrup & Levinson, composed of these appellants and one George W. Northrup, deceased, by way of an amendment and additional assignment of errors to the assignment filed with and attached to the transcript herein, say and aver that there is obvious and manifest errors in the proceedings and judgment in said cause in this:

3. The Court below erred in overruling the motion of the plaintiffs Newman, Northrup and Levinson for judgment in their favor, notwithstanding the verdict of the jury.

4. The Court below erred in overruling the motion of the plaintiffs Newman, Northrup & Levinson for a new trial.

CHARLES MARTINDALE AND
WILLIAM A. KETCHAM,
Att'ys for Appellants.

Filed Oct. 10, 1902.
R. A. BROWN, *Clerk.*

554 The State of Indiana to the Sheriff of the Appellate Court, Greeting:

You are hereby commanded to notify Harry B. Gates that on the 17″ day of March, 1902, Jacob Newman and S. O. Levinson, Surviving Partners of the firm of Newman, Northrup & Levinson, filed in the Clerk's office of the Appellate Court of Indiana a transcript of the record and proceedings in a certain suit appealed from the Marion Superior Court, in which Jacob Newman, *et al.* were plaintiffs, and Harry B. Gates was defendant, and notify said appellee that at the expiration of thirty days from the date of service of this writ, said appeal will be submitted to said Appellate Court; and unless he appear at the Appellate Court room in Indianapolis before said Appellate Court, and defend said appeal, the same will be proceeded upon in his absence. You are further commanded to make due return of this writ within ten days from date hereof.

Witness, Robert A. Brown, Clerk of said Appellate Court, and the seal thereof, at Indianapolis, this 17″ day of March, A. D. 1902.

[SEAL.] ROBERT A. BROWN, *C. A. C.*

Came to hand 10 A. M. March 18, 1902.

Served on the within Harry B. Gates by a full, true and complete copy of the writ in the above entitled cause delivered to the said Harry B. Gates and by reading to and within his hearing this 18th day of March 1902.

GEO. W. WEIR, *Sheriff.*

555 (Notation on Back:) No. 4386. In the Appellate Court Jacob Newman, *et al. vs.* Harry B. Gates. Notice to Appellee.

Sheriff's Fees.

Mileage	$ .40
Service	.40
Copy	.25
Docket	.10
Postage and return	.10
Total	$1.25

Marion County. Metcham & Martindale, Appellants' Attorneys.

556 And afterwards, to-wit: On March 25, 1902, come the appellants, by counsel, and file eight copies of their brief herein.

And afterwards, to-wit: On April 17, 1902, the same being the 124th Judicial Day of the November Term 1901 of said Court, come the parties by counsel, and this cause is submitted to the Court for judgment and decree, as provided by the Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the Rules of said Appellate Court adopted in relation thereto.

And afterwards, to-wit: On July 11, 1902, come the appellants, by counsel, and file their petition for an oral argument herein.

And afterwards, to-wit: On July 12, 1902, comes the appellee, by counsel, and files his petition for additional time in which to file his brief herein.

And on the same day, the Court being fully advised in the premises, grants appellee's petition for additional time herein, and the same is extended thirty (30) days from said date.

And afterwards, to-wit: On the same day, the Court being fully advised in the premises, sets the above entitled cause for oral argument on October 10, 1902, and orders notices issued to the three attorneys herein.

And afterwards, to-wit: On August 6, 1902, comes the appellee, by counsel, and files eight copies of his brief herein.

557 And afterwards, to-wit: On September 3, 1902, come the appellants, by counsel, and file their petition for leave to file a reply brief herein.

And afterwards, to-wit: On September 4, 1902, the Court being fully advised in the premises, grants appellants' petition for leave to file Reply Brief herein, and orders the same to be filed within thirty (30) days from August 30, 1902.

And afterwards, to-wit: On September 29, 1902, come the appellants, by counsel, and file eight copies of their Reply Brief herein.

And afterwards, to-wit: On October 4, 1902, come the appellants, by counsel, and file their motion and notice for leave to amend their Assignment of Errors herein, and also file eight copies of brief on said motion to amend Assignment of Errors herein.

And afterwards, to-wit: On October 9, 1902, comes the appellee, by counsel, and files eight copies of his brief in opposition to appellants' motion for leave to amend their Assignment of Errors herein.

And afterwards, to-wit: On October 10, 1902, come the parties by counsel, and the Court being advised in the premises, grants appellants' petition for leave to amend their Assignment of Errors herein.

And on the same day, come the appellants, by counsel, and file their Amendment to and Additional Assignment of Errors herein.

558 And afterwards, to-wit: On May 22, 1903, the same being the 155th Judicial Day of the November Term 1902 of said Appellate Court, come the parties by counsel, and the Court being advised in the premises, reverses the judgment of the Marion Superior Court, with the following opinion pronounced by Roby, C. J., with a dissenting opinion by Henley, J., in which Wiley, J.

concurs, which said opinions are in the words and figures following to wit:

559 THE STATE OF INDIANA.

In the Appellate Court, November Term, 1902.

On the 22nd day of May 1903, being the 155th Judicial day of said November Term, 1902.

Hon. Frank S. Roby, Chief Judge, Hon Woodfin D. Robinson, Hon. William J. Henley, Hon. James B. Black, Hon. Daniel W. Comstock, Hon. Ulric Z. Wiley, Judges.

No. 4386.

In the case of

JACOB NEWMAN ET AL., Surviving Partners, &c.,
vs.
HARRY B. GATES.

Appeal from the Marion Superior Court.

(46388.)

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Roby, C. J.

Dissenting opinion by Henley, J.

Wiley, J., concurs.

June 19, 1903, the 23rd Judicial day of the May Term, 1903 petition for rehearing overruled. Roby, Black, Robinson and Comstock, J. J., concurring. Henley and Wiley, J. J., dissenting.

560 This action is founded upon a judgment rendered by the circuit court of Cook County, Illinois, against appellee and in favor of "Jacob Newman, George W. Northrup, Jr., and S. O. Levinson, as co-partners, as Newman & Northrup."

The persons named brought their suit in the Superior court of Marion county, Indiana. Appellee filed a counter claim in which he averred "that the plaintiffs are, and for more than two years last past have been, partners, engaged in the practice of law in the city of Chicago, Illinois, under the firm name of Newman & Northrup."

The judgment from which this appeal was taken was rendered on July 25, 1901, ninety days' time being then given to the plaintiffs within which to file their bill of exceptions.

On Sept 25th, Jacob Newman and S. O. Levinson presented the bill of exceptions as surviving partners of said firm, and showed to the court the death of said Northrup since the overruling of the motion for a new trial. The bill of exceptions was thereupon signed and filed.

Errors are assigned by Jacob Newman and Solomon O. Levinson

as surviving partners of said firm. After the death of a member of a partnership the surviving partner or partners have a right to the control and possession of the property of the firm and are only liable to the personal representatives or heirs of the deceased partner, for his proportion of the surplus remaining after the settlement of the partnership affairs. Valentine *v.* Wysor, 123 Ind. 47; McIntosh *v.* Zaring, 150 Ind. 301, 312; Anderson *v.* Ackerman, 88 Ind. 481.

The right of surviving partners to institute proceedings for the collection of the firm's debts and their right to complete and prosecute proceedings pending are exactly equal, and beyond question.

Upon the former appeal it was held that the counter-claim, "is based upon a breach of the contract by which appellees were to give appellant all necessary legal advice in the matter for which they were employed." Gates *v.* Newman, 18 Ind. App. 392, 407.

"The right to sue for claims due the firm as well as the liability to be sued for claims against the firm devolves exclusively upon the surviving partner." Hess *v.* Lowery, 122 Ind. 225, 229.

561 Having been sued by a partnership upon contract and having elected to set up against it a claim growing out of the same contract the appellee must abide the final result of the suit. His objections to the bill of exceptions and assignment of errors, on account of their being filed and made by the surviving partners is not therefore well taken.

Upon the first trial the court refused to admit evidence in support of the counter claim, holding that the judgment of the Illinois court conclusively supported the reply of *res adjudicata* made by the plaintiffs. Upon appeal this court held that the pleading stated something more than a mere defense, and that whether the questions therein involved were in fact adjudicated in the prior action was a question of fact. Gates *v.* Newman, *supra*.

Upon the second trial the jury returned a verdict for the plaintiffs upon the complaint and for defendant upon his counter-claim, assessing damages on the counter claim at $184.74 in excess of the amount due plaintiffs. From this judgment this appeal is prosecuted.

The counter-claim alleged certain breaches of duty arising from the relation of attorney and client, in connection with the employment, on account of which the Illinois judgment was rendered. These breaches were as follows. First: Neglecting to inform defendant that by the laws of Illinois an advance order authorizing the employment of counsel by the trustee, in a voluntary assignment, for the benefit of creditors, was necessary to charge the estate with counsel fees and that the failure to procure it renders the trustee personally liable therefor, and their neglect to obtain such order. Second: Misconduct in bidding at the sale of the assets of the trust estate, whereby defendant as trustee was prevented from realizing money on such assets, out of which he might have reimbursed himself.

It is shown by the evidence without conflict that all matters in relation to the alleged misconduct of the plaintiffs in bidding at the

sales of the assets of the trust estate were presented upon the trial in which the original judgment was rendered. Having been once judicially considered they can not be a second litigated.

The employment by the defendant of the plaintiffs was a single employment. They brought their action to recover for serv-
562 ices rendered therein. In that action it was incumbent upon them to set up their entire claim. They could not have one judgment and thereafter, in any form, obtain a further judgment on account of some overlooked item.

The defendant had the option of presenting his claim, on account of the alleged misconduct, in the action brought against him or to set it up subsequently. When he chose to litigate the subject it devolved upon him to present each item involved therein.

Neither party had the right to split up his cause of action; if they had there might be as many law suits as there were items in their respective claims. Hoover *v.* Kilander, 135 Ind. 600.

The principal announced in Fischli *v.* Fischli, 1 Blkf. 360, often approved and never doubted, is directly applicable.

The subject of the counter claim having been involved in the prior action the judgment then rendered is conclusive and the jury should have been so instructed. The wisdom of the rule is illustrated by the facts of this case. It is established without conflict that the counter-claim in so far as it counts upon a failure to procure an order relative to attorney fees prior to the final settlement of the trust is entirely without foundation.

The cause was submitted to the jury upon the question of appellant's negligence in failing at the final settlement to procure an order charging the estate with attorney fees, before the assets thereof were permitted to go out of court, a breach of duty not described or set up in the counter-claim.

An essential condition of the alleged wrong was that the relation of attorney and client existed between the parties at the time of the discharge. The evidence upon this subject, a disputed one at this time, was heard in the original trial.

Judgment reversed, and cause remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent herewith.

Comstock and Robinson, J. J., concur.

Black, P. J., concurs in the conclusion reached in the foregoing opinion of Roby, C. J.

Henley and Wiley, J. J., dissent.

563 Dissenting opinion by Henley, J.

This judgment having been rendered against three individuals appellants jointly, one of whom has died after judgment and before the appeal was taken, it would appear that the two living parties should at least be joined as appellants, and this without regard to the question of whether or not the "surviving partnership" or the personal representative should represent the deceased joint judgment debtor in the apepal.

If this judgment was reversed against whom could the appellee

prosecute his claim? The action as against Northrup has abated by his death. Hess *v.* Lowery, 122 Ind. 225.

Then only against Newman and Levinson, who in their individual capacity are not here made parties to this appeal in any manner.

If reversed the estate of Northrup is released from any liability, and a part of his estate is represented by his interest in the partnership assets of Newman & Northrup. If affirmed all his estate, including his interest in the partnership of Newman & Northrup is held for the payment of the judgment. His personal representative is thus directly interested in the appeal, and, in a way, adverse to the interests of his surviving partners, in their capacity as such partners.

The affirmance of the judgment in the present form of the appeal would be an affirmance against "Newman & Levinson as surviving partners of the firm of Newman & Northrup." The identity and value of appellee's personal judgment against Jacob Newman, S. O Levinson and George W. Northrup, Jr., would be lost to him. Appellee's judgment in the trial court would entitle him to exhaust the joint property of the partnership, and, if necessary, to the satisfaction of his claim, the individual property of each of the judgment defendants. Appellee, if entitled to anything, was entitled to something more than a judgment against the surviving partnership of Newman & Northrup. The trial court gave him more than this, and an appeal which does not represent every interest of all parties to the judgment below ought not to have and does not have any standing in Appellate courts.

It would, I think, be an apt illustration to put the case in this form: The persons composing the firm of Newman & Northrup, bring an action against Gates in their individual names, to
564 recover a money judgment for services due the firm, and Gates brings an action, in the shape of a counter-claim against the individual members of the firm of Newman & Northrup. All the parties are living when the trial occurs, and the result is a judgment in favor of Gates upon the cause of action stated in his counter-claim. But suppose that during the pendency of the action and before judgment Northrup had died, then the cause of action represented by the facts stated in the counter-claim would have, if it abated as to Northrup, proceeded against the surviving partners, Newman & Levinson and not against the legal entity represented by the "surviving partnership of Newman & Northrup." If it was an action that did not abate, then it would be against Newman & Levinson, as individuals, and the personal representative of Northrup, and certainly not against the "surviving partnership of Newman & Northrup." § 636 Horner.

It must be borne in mind that appellants are prosecuting this appeal from a judgment *against* Jacob Newman, S. O. Levinson and George W. Northrup, Jr. upon their complaint, and also a judgment in favor of Gates against the same persons upon Gates' cross action. There is certainly a wide difference in the scope and meaning of the words "surviving partner or partners" and the trusteeship or trust

estate represented by the words "surviving partnership." The appeal ought to be dismissed for this reason.

The appeal ought to be dismissed for another reason. The rule that the names of the parties must be stated in full in the assignment of errors has been uniformly and strictly enforced in this State. Elliott's App. Proc. § 322; Braden *v.* Leibenguth, 126 Ind. 336; Thomas *v.* State, 86 Ind. 102; Todd *v.* Wood, 80 Ind. 429; Louisville etc. R. Co. *v.* Head, 71 Ind. 176; Kiley *v.* Perrin, 69 Ind. 387; Darnall *v.* Hirst, 55 Ind. 275; Thomas *v.* Service, 90 Ind. 128.

The person represented by the name S. O. Levinson is not before the court under any of the decisions. The assignment is fatally defective. Parties can not appeal using only the initials of their names in their complaint in this court. Thomas *v.* State, *supra;* Thomas *v.* Service, *supra;* Burke *v.* State, 47 Ind. 528.

Aside from the question of appellate procedure presented by appellee, I think upon the law of the case as stated in Gates *v.*
565 Newman, 18 Ind. App. 392, this judgment ought to be affirmed.

It is not necessary to cite authority to sustain the rule that the law as stated upon a former appeal remains the law applicable to that case through all its proceedings and that this is true whether the law as stated in the former appeal is right or wrong, and upon this basis alone I think the judgment ought to be affirmed.

In the former appeal (Gates *v.* Newman, *supra,* p. 411), this court stated the law applied to this case as follows:

"*In the case at bar the negligence of the appellees, as set out in the third paragraph, would not have been admissible under the general issue, for the reason that it could have nothing to do with the value of appellees' services. It would have tended to defeat neither the whole nor a part of the value of such services. It states no mere defense but purely a cross action which has always been allowed at common law in cases where recoupment may be proper.*"

This statement was made in relation to the evidence admissible under the issue made by the pleadings, in Cook county, Illinois, which consisted of a common count for work and labor and a plea of *non assumpsit.* The judgment against Gates was reversed upon a former appeal; this court holding that appellee's cross-action stated facts sufficient, if proven, to entitle him to recover; with the further statement that the facts necessary to establish his cross-action would not be admissible under the issues as formed in the Illinois court.

Upon a second trial of this cause in the Marion Superior court, the result of which is the basis of the appeal, appellee introduced in evidence, over the protest and objection of appellants, the complete transcript of all the proceedings in the case in Cook county, Illinois, for the purpose of showing that the only issue made in the Illinois court was by the common count for work and labor and the plea of *non assumpsit,* and for the purpose of informing the trial court that under the rule as announced in Gates *v.* Newman, *supra,* the evidence necessary to sustain appellee's cross-action could not have been introduced, nor the question litigated. The trial court, the Superior Court of Marion county, upon the showing, permitted evidence to be

introduced to sustain appellee's cross-action, and under the ruling in Gates *v.* Newman, *supra,* properly submitted the questions of fact
to the jury as to whether anything more than the complaint
566 and general denial made up the issues upon the trial of the
cause in Illinois and whether Gates had in the Marion Superior Court sustained his cross-action.

The jury gave appellee affirmative relief, which he could not have had under the issues presented in the Illinois court, and under the law as stated in Newman *v.* Gates, *supra,* he could have introduced no evidence, under such issue, except for the purpose of disproving the value of appellants' services, and this, in fact, was the effect and purpose of all the evidence introduced by appellee upon the trial in Cook county as is shown by the transcript introduced in evidence. The judgment ought to be affirmed.

Wiley, J., concurs.

567 And afterwards, to-wit: On May 23, 1903, come the appellants, by counsel, and file their motion, notice and brief (8) to have said opinion certified down to the Marion Superior Court forthwith.

And afterwards, to-wit: On May 25, 1903, comes the appellee, by counsel, and files eight copies of his brief in opposition to said motion of appellants to certify said opinion to the Marion Superior Court forthwith.

And afterwards, to-wit: On May 26, 1903, come the parties by counsel, and the Court being advised in the premises, overrules appellants' motion to certify said opinion to the Marion Superior Court forthwith.

And afterwards, to-wit: On June 16, 1903, comes the appellee, by counsel, and files his petition and brief (8) for a rehearing of the above entitled cause.

And afterwards, to-wit: On June 19, 1903, the same being the 23rd Judicial Day of the May Term 1903 of said Appellate Court, come the parties by counsel, and the Court being advised in the premises, overrules the petition for a rehearing heretofore filed herein by the appellee, with Comstock, J. concurring, and with Roby, Black, Robinson, Henley and Wiley, J. J. J. J. dissenting, and orders that the opinion announced in said cause on May 22, 1903, by Roby, C. J., with Henley, J. dissenting, and with a dissenting opinion by Wiley, J., be spread of record.

568 And afterwards, to-wit: On June 25, 1903, comes the appellee, by counsel, and files his motion and notice to modify the mandate heretofore entered herein.

And afterwards, to-wit: On June 26, 1903, the Court being advised in the premises, overrules appellee's motion to modify the mandate heretofore entered herein.

And afterwards, to-wit: On July 16, 1903, comes the appellee, by counsel, and files eight copies of his petition to remove the above entitled cause to the Supreme Court for decision.

And afterwards, to-wit: On December 6, 1904, the Supreme Court being advised in the premises, grants appellee's petition to remove the above entitled cause from the Appellate Court to that court for decision, and said cause is thereupon numbered 20,490 in said Supreme Court.

And afterwards, to-wit: On December 7, 1904, the same being the 9th Judicial Day of the November Term 1903 of said Supreme Court, come the parties by counsel, and the Court being advised in the premises, dismisses the appeal from the judgment of the Court below, with the following opinion pronounced by Monks, J., which said opinion is in the words and figures following, to-wit:

569 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1904.

On the 7th day of December, 1904, being the 9th Judicial day of said November Term, 1904.

Hon. Alexander Dowling, Chief Justice. Hon. John V. Hadley, Hon. Leander J. Monks, Hon. John H. Gillett, Hon. James H. Jordan, Justices.

No. 20490.

In the Case of JACOB NEWMAN ET AL., Surviving Partners, etc.,
vs.
HARRY B. GATES.

Appeal from the Marion Superior Court.

(46388.)

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Monks, J.

Appeal Dismissed.

570 Transferred from the Appellate Court Under Clause 2 of Section 1337*u*, Burns, 1901.

This action was brought by appellants and George W. Northrup, Jr. on a judgment recovered by them, against appellee in the circuit court of Cook county, Illinois, for services as attorneys for appellee, performed by them as partners.

Appellee filed a counter-claim alleging certain breaches of duty arising from the relation of attorney and client in connection with the employment of said firm as his attorneys, for which services said

Illinois judgment was rendered. The breaches of duty alleged in the counter-claim by appellee, were acts of commission and omission by the plaintiffs below as the attorneys for the appellee by reason of which he suffered great pecuniary loss, on account of which he demanded judgment for $2,500.

Said cause was tried and final judgment rendered which was reversed by the Appellate Court. Gates *v.* Newman, 18 Ind. App. 392, Newman *v.* Gates, 150 Ind. 59, 61. It was held by the Appellate Court on the former appeal that the counter-claim "is based upon a breach of contract." After said cause was returned to the court below a second trial resulted in a verdict and judgment in favor of appellee against said three defendants to said counter-claim, in the sum of $184.74, and costs. Before the appeal was taken from said judgment, George W. Northrup, Jr., one of the plaintiffs below and one of the persons against whom said judgment was rendered, died.

Appellee insists that this court has no jurisdiction of this appeal for the reason that the personal representative of George W. Northrup, Jr. deceased, a co-party to said judgment, has not been made an appellant.

This is a vacation appeal and it is well settled that all the parties against whom the judgment was rendered must be made co-appellant on appeal or the appeal will be dismissed for want of jurisdiction. Rich Grove Township *et al. v.* Emmett, (this term) and cases cited.

Section 648 Burns 1901, (636 R. S. 1881 and Horner 1901) provides that: "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment."

571 Section 272 Burns 1901 (271 R. S. 1881 and Horner 1901) provides that "No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court on motion or supplemental complaint at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

It is clear under our statutes concerning the causes of action that survive, secs. 283, 284, 285 Burns 1901 (282, 283, 284 Horner 1901) that causes of action for breaches of duty by attorneys to their clients by which the property rights and interests of the clients are affected injuriously, survive the death of either party. Weeks on Attorneys at Law, p. 625; Allen *v.* Clark, Exr. 11 Weekly Reporter, 304, 7 L. T. N. S. 781; Knight *v.* Quarrels, 4 Moore 532, 2 Brod. & B. 102; Feary *v.* Hamilton, 140 Ind. 45, 51-53 and cases cited; Boor *v.* Lowery, 103 Ind. 468 and cases cited, 53 Am. Rep. 519 and note pp. 525-539; Hess *v.* Lowrey, 122 Ind. 225, and cases cited; 33 Albany L. J. pp. 184-187, 204-208 and cases cited.

It is true that after the death of a member of a partnership the surviving partner or partners are vested with the exclusive right of possession and management of the partnership property, including the exclusive right to collect the debts due the partnership by suit or otherwise. Parsons on Partnerships, secs. 342, 344, 345; McIntosh v. Zaring, 150 Ind. 301, 312 and cases cited; Valentine v. Wysor, 123 Ind. 47, 52.

In this State a firm creditor is not required to exhaust his remedy against the surviving partners or show that they are insolvent before he can resort to the estate of the deceased partner. He may proceed at once on the death of a partner against the estate of the deceased partner as well as against the surviving partners. Ralston v. Moore, 105 Ind. 245; See, Camp v. Grant, 21 Conn. 41, 55-56. If suit was not commenced on said claim against the members of the partnership before the death of the partner, the statute requires that the proceeding against the estate be by claim filed against said estate under Sec. 2463 Burns 1901. In other words, while rights of action
572 for liabilities due a partnership survive and vest exclusively in the surviving members of the firm, the liabilities of the partnership on the death of a partner, survive not only against the surviving partners but also against the estate of the deceased partner.

In this case, Northrup died after the rendition of the judgment on the counter-claim against him and his co-defendants to the counter-claim, Newman and Levison. Such a judgment binds the partnership property and the individual property of each judgment defendant, and may in the absence of a statute to the contrary, be enforced by execution against the separate property of each of said judgment defendants before having recourse to the partnership property. Story on Partnership, §260.

Said Northrup having died after the counter-claim was filed, the case stands, so far as the question under consideration is concerned, in all respects the same as if said counter-claim was an independent action against the defendants thereto, and judgment had been rendered in favor of appellee for said sum of $184.74. If an independent action had been commenced against the members of said firm for the cause of action set up in said counter-claim, in the court below, and thereafter and before judgment, said Northrup had died, then his administrator or executor could have been made a party defendant in said action and the same prosecuted to final judgment, under the provisions of §272 (271) *supra*.

As said cause of action could have been revived against the personal representative of said Northrup under §272 (271), *supra*, it follows, under the provision of §648, *supra*, that such personal representative was a necessary party appellant to the appeal and should have been made a co-appellant and served with notice. Rich Grove Tp. v. Emmett, (this term) and cases cited.

The prohibition of section 2465 Burns 1901, against bringing actions against an executor or administrator by complaint and summons, and requiring all claims against the estate to be filed in the clerk's office, does not apply to such a case. It relates to the bringing of actions, and not to those brought before the death of the deceased,

while §272 (271) *supra*, has reference to actions already commenced, and forbids their abatement by the death of any or all the parties if the cause of action survives, and provides for the prosecution of the action by or against the personal representative of the
573 deceased party. Holland *v.* Holland, 131 Ind. 196, 200, 201; Clodfelter *v.* Hulett, 92 Ind. 426, 434; Lawson *v.* Newcomb, 12 Ind. 439; Burnett *v.* Milnes, 148 Ind. 230, 235; I Woolen's Trial Procedure, §§555-561.

On account of the failure to make the personal representative of George W. Northrup, Jr. a co-appellant, the court has no jurisdiction to determine the case upon its merits. The appeal must, therefore, be dismissed. Rich Grove Township *v.* Emmett, (this term) and cases cited.

Appeal Dismissed.

574 It is therefore considered by the Court that the appeal from the judgment of the Court below in the above entitled cause, be dismissed, at the cost of the appellants, all of which is ordered to be certified to said Court.

And it is further considered and adjudged by the Court that the appellee recover of the appellants the sum of $—, for his costs and charges in this behalf expended.

And afterwards, to-wit: On February 4, 1905, come the appellants, by counsel, and file their petition for a rehearing herein.

And afterwards, to-wit: On February 23, 1905, come the appellants, by counsel, and file eight copies of their additional authorities herein.

And afterwards, to-wit: On June 21, 1905, the same being the 27th Judicial Day of the May Term 1905 of said Supreme Court, come the parties by counsel, and the Court being advised in the premises, overrules the petition for a rehearing heretofore filed herein by the appellants, and orders the opinion announced in said cause on December 7, 1904, by Monks, J. to be spread of record.

575 I, Robert A. Brown, Clerk of the Supreme Court and *ex-Officio* Clerk of the Appellate Court of the State of Indiana, certify the above and foregoing to be a true and complete transcript of the record of proceedings had, papers filed, (except briefs), motions decided, rulings made, opinions delivered, judgments rendered, and all orders entered in the Supreme and Appellate Courts of Indiana in the cause entitled Jacob Newman *et al.* etc., *vs.* Harry B. Gates, and numbered 4386 in the Appellate Court, and 20490 in the Supreme Court, as appears from the original transcript and papers on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Indiana, at the City of Indianapolis, Indiana, this 4th day of October, 1905.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBT. A. BROWN,
Clerk Supreme Court of Indiana.

576 In the Supreme Court of Indiana.

No. 20490.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson, Appellants,
vs.
HARRY B. GATES, Appellee.

Assignment of Errors.

Now come the above appellants, Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, and file their petition for a writ of error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States they make the following assignment:

The Supreme Court of Indiana erred in holding and deciding that the appellee Gates had or could have a valid counter-claim based upon a breach of the same contract of hiring as attorneys, which was the subject of the action in the cause between the same parties wherein the judgment against appellee Gates in the Circuit Court of Cook County, Illinois, being the judgment sued upon in this action, was rendered; that because appellee Gates had such counter-claim, and because it was of a nature which would survive the death of one of the defendants thereto and which might have been revived against his personal representative, the personal representative of the deceased member of the partnership, who
577 were the original plaintiffs, was a necessary party to the appeal.

The Court did not give to the judgment of the Circuit Court of Cook County, Illinois, that force and effect which it has between parties in the state in which it was rendered, to-wit: the State of Illinois, and has denied full faith and credit to said judgment, contrary to and in violation of Article 4, Section 1 of the Constitution of the United States, which Section of the Constitution of the United States was cited and relied upon in the trial court, in the Appellate Court and in the Supreme Court.

The said errors are more particularly set forth as follows:

The Supreme Court of Indiana erred in holding and deciding:—

1. That the counter-claim set up by appellee Gates, the defendant, in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois wherein it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States.

2. That the appellee's counter-claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrup & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not
578 having been made parties that neither the Appellate Court of the State of Indiana nor the Supreme Court of the State of Indiana had jurisdiction to determine the appeal and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, Section 1 of the Constitution of the United States, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," which adjudication was adverse to appellants' claim under said provision of the Constitution of the United States.

For which errors the appellants, Jacob Newman and Salmon O. Levison, surviving partners of the firm of Newman, Northrup & Levison, pray that the judgment of the said Supreme Court of Indiana, dated June 21, 1905, be reversed and a judgment entered for the appellants aforesaid and for costs.

CHARLES MARTINDALE,
S. S. GREGORY,

Attorneys for Jacob Newman and Salmon O. Levinson, Surviving Partners of the Firm of Newman, Northrup & Levinson.

578½ No. 20490. Supreme Court of Indiana. Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, appellants, *vs.* Harry B. Gates, appellee. Assignment of errors. Filed Oct 3-1905. R. A. Brown, Clerk. Charles Martindale, attorney at law, Indianapolis, Indiana.

579 In the Supreme Court of Indiana.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the firm of Newman, Northrup & Levinson, Appellants,
vs.
HARRY B. GATES, Appellee.

Petition for Writ of Error.

To the Chief Justice and the Associate Judges of the State of Indiana:

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the appellants hereby pray a writ of error from the said decision and judgment to the Supreme Court of the United States.

And your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error, under Statutes of the United States authorizing writs of error to said courts,

and particularly under Section 709 of the Revised Statutes of the United States, because in the records and proceedings had in said cause and in the rendition of said judgment manifest error happened to the great damage of these petitioners in that in said cause, by the judgment therein rendered, it was held and adjudged that the defendant Gates had a valid counterclaim against appellants and their deceased partner, George W. Northrup, based upon a breach
580 of the same contract of hiring as attorneys, which was the subject of the action in the cause between the same parties, wherein the judgment against defendant Gates in the Circuit Court of Cook County, Illinois, being the judgment sued upon in this action, was rendered.

That in said cause, in the trial court, appellants objected to the introduction of any evidence in support of said counter-claim on the ground that it must be conclusively presumed that all questions which were or might have been tried under the issues were adjudicated, and claimed the protection of Article 4, Section 1 of the Constitution of the United States, requiring that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

(Transcript, p-. 202-346.)

That after the evidence had been heard appellants requested the Court to instruct the Jury to find for the plaintiffs on the ground that the provisions of Article 4, Section 1 of the Constitution of the United States, requiring full faith and credit to be given to the judgment of the Circuit Court of Cook County, Illinois, the causes of action set forth in the defendant's counter claim were adjudicated.

(Rec., p-. 113-114, Instruction 9.)

The same protection of the Constitution of the United States was reserved in assigning error in the motion for a new trial and in the assignment of errors on the over-ruling of the motion for a new trial.

That the question was argued in the Appellate Court, which sustained appellants' contentions, and was argued in this Court both in the original hearing and upon the petition for a rehearing.

That this Court did not in terms pass upon the claim distinctly made before it as aforesaid, but the final judgment of this
581 Court necessarily involved the adjudication of the claims of appellants to the protection of the constitutional provision aforesaid, and determined those claims against the contention of appellants and denied to appellants the title, right, privilege and immunity so claimed under the Constitution of the United States by appellants, because the decision of this Court, dismissing the appeal, was based upon the following premises:

a. Appellee Gates had a valid counter-claim against appellants.

b. The nature of that counter-claim was such that it would survive the death of one of the appellants, (defendants to said counter-claim).

c. The personal representative of the deceased member of the partnership was therefore a necessary party to the appeal, and not bing made a party the appeal is dismissed.

Which judgment of the Supreme Court, entered June 21, 1905, in this cause:

1. Denied to and withheld from judicial proceedings of the State of Illinois the full faith and credit guaranteed in and by the Constitution of the United States in each state to the public acts, records and judicial proceedings in every other state contrary to the provisions of Article 4, Section 1 of the Constitution of the United States.

The assignment of errors is filed herewith.

CHARLES MARTINDALE,
S. S. GREGORY,
Attorneys for Jacob Newman and Salmon O. Levinson, Surviving Partners of the Firm of Newman, Northrup & Levinson.

582 In the Supreme Court of Indiana.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson, Appellants,
vs.
HARRY B. GATES, Appellee.

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that the writ of error be allowed to said Court and that the same be made a supersedeas, the bond in the penal sum of Five Hundred Dollars ($500.00) herewith presented being approved.

In testimony whereof witness my hand this 3 day of October, A. D., 1905, and the seal of this Court.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

LEANDER J. MONKS,
Chief Justice of the Supreme Court of Indiana.

Attest: ROB'T A. BROWN, *Clerk.*

582½ [Endorsed:] No. 20490. Supreme Court of Indiana. Jacob Newman and Salmon O. Levinson, Surviving Partners of the Firm of Newman, Northrup & Levinson, Appellants, *vs.* Harry B. Gates, Appellee. Petition for Writ of Error and Order of Allowance. Filed Oct. 3, 1905. R. A. Brown. Charles Martindale, Attorney at Law, Indianapolis, Indiana.

583 Supreme Court of the United States.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson, Plaintiffs in Error,
vs.
HARRY B. GATES, Defendant in Error.

Bond.

Know all men by these presents, That we, Jacob Newman and Salmon O. Levinson, as surviving partners of the firm of Newman, Northrup and Levinson, and in our individual capacities, as principals, and American Surety Company of New York, as sureties, are held and firmly bound unto Harry B. Gates in the sum of five Hundred Dollars ($500.00) to be paid to the said Harry B. Gates, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of September, 1905.

Whereas the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Indiana;

Now therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

JACOB NEWMAN.
SALMON O. LEVINSON.
AMERICAN SURETY COMPANY
OF NEW YORK,
By DANIEL T. HUNT, *Res. Vice Pres.*

Attest:
FREDERIC F. NORCROSS,
Res. Ass't Sec'y.

The above bond is approved.
[SEAL.] LEANDER J. MONKS,
Chief Justice of the Supreme Court of Indiana.

584 The original of the foregoing supersedeas bond was lodged with the Clerk of the Supreme Court of the State of Indiana on the 3rd day of October, 1905, and the following endorsement made thereon: "Bond, Filed Oct. 3, 1905, R. A. Brown, Clerk."

585 UNITED STATES OF AMERICA:

The President of the United States of America to the Judges of the Supreme Court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Supreme Court, before you, between Jacob Newman and Salmon O. Levinson, Surviving Partners of the firm of Newman, Northrup & Levinson, Appellants, and Harry B. Gates, Appellee, a manifest error hath happened to the great damage of the said Appellants as by his complaint appears: and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, thirty days after the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 3d day of October, A. D. 1905.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Allowed:

LEANDER J. MONKS,
Chief Justice of the Supreme Court of Indiana.

[Endorsed:] Filed Oct. 3, 1905. R. A. Brown, Clerk.

586 The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of the State of Indiana on the 3rd day of October, 1905, and also at the same time and place a copy thereof for the defendant, Harry B. Gates. The following endorsement was made upon the said original writ and upon the copy: "Writ of Error; Filed Oct. 3, 1905, R. A. Brown, Clerk."

587 And afterwards, to-wit: On the 3rd day of October, 1905, came the appellants, by counsel, and filed in the office of the Clerk of said Supreme Court of Indiana, the Citation on said Writ of Error, duly signed by Hon. Leander J. Monks, Chief Justice of said Supreme Court, and acknowledgement of service of the Citation by the attorneys for the Defendant in Error, said original Citation and acknowledgement of service thereof being hereto next below attached.

588 UNITED STATES OF AMERICA, *ss:*

To Harry B. Gates, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the Supreme Court of the State of Indiana wherein Jacob Newman and Salmon O. Levinson, surviving parties of the firm of Newman, Northrup & Levinson, are plaintiffs in error and you are defendant in error, to show cause, if any there be why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Indiana this third day of October, 1905.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

LEANDER J. MONKS,
Chief Justice of the Supreme Court of the State of Indiana.

Attest:
ROB'T A. BROWN,
Clerk of the Supreme Court of the State of Indiana.

INDIANAPOLIS, IND., *Oct.*, 1905.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

BAKER & DANIELS,
E. E. GATES, &
LEWIS C. WALKER,
Attorneys for Harry B. Gates.

[Endorsed:] Filed Oct. 3, 1905. R. A. Brown, Clerk.

589 UNITED STATES OF AMERICA:

Supreme Court of Indiana.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Indiana, in the City of Indianapolis, this 4th day of October, 1905.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk Supreme Court of Indiana.

Costs of Suit.

Plaintiff's costs paid by Plaintiff in error	$298.55
Costs of transcript paid by Plaintiff in error	250.00

Endorsed on cover: File No. 19,940. Indiana Supreme Court. Term No. 137. Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, plaintiffs in error, *vs.* Harry B. Gates. Filed October 23d, 1905. File No. 19,940.

Stipulation and Addition to Record.

In the Supreme Court of the United States, October Term, 1905.

No. 137.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup and Levinson, Plaintiffs in Error,
vs.
HARRY B. GATES, Defendant in Error.

The defendant in error, Harry B. Gates, upon the condition that this agreement and consent is made and filed without prejudice to the right of said defendant in error to file and present in this cause in said Supreme Court his motion to dismiss or affirm upon the ground that said Supreme Court has not and cannot have jurisdiction of the subject matter in said cause and reserving the right to file and present such motion to dismiss or affirm and without prejudice to such right, does hereby agree and consent that the petition of Harry B. Gates filed July 16th, 1903, in the Appellate Court of the State of Indiana, to remove the cause entitled Newman *et al. vs.* Gates, No. 4386, from said Appellate Court to the Supreme Court of Indiana and the petition for rehearing filed by Jacob Newman and Salmon O. Levinson as Surviving Partners of the Firm of Newman, Northrup and Levison, in the Supreme Court of the State of Indiana on February 4th, 1905 in cause therein numbered 20490 and which said petition to remove and said petition for rehearing were respectively omitted from the record filed in the office of the Clerk of the Supreme Court of the United States, in the above entitled cause, may severally, as certified by R. A. Brown Clerk of the said Supreme Court of Indiana, be now made parts of said record the same as if such petition to remove and such petition for rehearing had each been included in the transcript certified by the said Clerk of the Supreme Court of Indiana and as aforesaid filed in the office of the Clerk of the Supreme Court of the United States.

Indianapolis, Indiana, September 7th, 1906.

HARRY B. GATES,
By ALBERT BAKER,
Attorney for Said Defendant in Error, Harry B. Gates.
CHARLES MARTINDALE,
Attorney for Plaintiffs in Error.

EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Of Counsel.

In the Supreme Court of Indiana.

No. 4386.

JACOB NEWMAN and S. O. LEVISON, as Surviving Partners of Newman & Northrup, Appellants,
vs.
HARRY B. GATES, Appellee.

In the Appellate Court of Indiana.

Application of Harry B. Gates, Said Appellee, for the Transfer of Said Cause into the Supreme Court.

The appellee in the above entitled cause, Harry B. Gates, respectfully petitions the Supreme Court of Indiana that it order and cause the above entitled cause to be transferred from the said Appellate Court of Indiana to the Supreme Court of Indiana for the following reasons and each of them:

1. The opinion and decision of said Appellate Court, (sitting in banc) directly involves a new question of law which said Appellate Court has, in the opinion and decision hereby sought to be reviewed, decided erroneously in this, namely: In said opinion and decision it is ruled and held that from the judgment rendered by the Superior Court of Marion County, Indiana, in favor of said Harry Gates and against Jacob Newman, George W. Northrup, Jr., and Salmon O. Levison an appeal can be taken and maintained by said Jacob Newman and S. O. Levison, as surviving partners of Newman & Northrup, without joining the personal representative of said George W. Northrup, Jr., as an appellant, and without notice to such personal representative, and without joining Jacob Newman and Salmon O. Levison individually and respectively as appellants, whereas said Appellate Court should have held and decided that an appeal could only be taken from said judgment by Jacob Newman, Salmon O. Levison, and the personal representative of George W. Northrup, Jr., jointly as appellants, and that said appeal, not having been so taken, and no notice of the appeal having been served upon the personal representative of said George W. Northrup, Jr., said appeal should be dismissed.

2. The opinion and decision of said Appellate Court (sitting in banc) directly involves a new question of law, which said appellate court has, in the opinion and decision hereby sought to be reviewed, decided erroneously in this, namely: In said opinion and decision it is ruled and held that after the rendition of the judgment from which this appeal is attempted to be taken and after the end of the term of said Marion Superior Court (by which said judgment was rendered) at which said judgment was rendered, said Marion Superior Court could make a finding and order that after the end of said term of said Marion Superior Court at which said judgment was rendered the said George W. Northrup, Jr., had departed this life,

and that said finding and order are conclusive as to the fact of the death of said George W. Northrup, Jr., upon said Appellate Court for the purposes of such appeal, whereas said Appellate Court should have held and decided that for the purposes of said appeal the said Appellate Court was the only tribunal to which proof of the death of said George W. Northrup, Jr., after the end of said term of said Superior Court could lawfully be submitted, and that in the absence of such proof of death to said Appellate Court that court must presume that he is alive and dismiss said appeal, because said George W. Northrup, Jr., is not a party to said appeal.

3. The opinion and decision of said Appellate Court contravenes a ruling precedent of the Supreme Court of Indiana, viz., the doctrine of "the law of the case" as stated in Hatfield *v.* Cummings, 152 Ind. 537, and cases therein cited, because in the case of Gates *v.* Newman, 18 Ind. App. 392,—this case on first appeal—the Appellate Court did not construe the counter-claim of said Gates as averring that by the law of the State of Illinois the order of court authorizing the employment of an attorney by a trustee in insolvency proceedings must be made in advance of such employment and such order could not be an order confirmatory of such employment, but said appellate court construed said counter-claim as averring that a formal order of court authorizing the employment of attorneys by such trustee was necessary, whereas in the opinion and decision hereby sought to be reviewed said Appellate Court construed said counter-claim as averring that such order must be procured *in advance* of such employment.

4. If in construing the counter-claim of appellee, Harry B. Gates, the Appellate Court did not contravene a ruling precedent of the Supreme Court of Indiana by ignoring the doctrine of "the law of the case," and the Appellate Court in this appeal—notwithstanding the decision in the case of Gates *v.* Newman, 18 Ind. App. 392—had the right to construe the counter-claim of said Gates, appellee herein, as averring that the order of court authorizing the employment of an attorney by a trustee in insolvency proceedings must by the law of Illinois be made in advance of such employment in order to protect said trustee from personal liability for such attorneys' fees, then the opinion and decision of said Appellate Court hereby sought to be reviewed contravenes a ruling precedent of the Supreme Court of Indiana, viz. the case of Evansville & Richmond R. R. Co. *v.* Moddux, 134 Ind. 571, in its holding that when there is a variance between the case made by the pleadings and that made by the proof, and the pleading could have been amended so as to correspond with the proof, such amendment will be presumed, on appeal, to have been made, inasmuch as the record here shows a verdict on said counter-claim in favor of the appellee.

We respectfully ask that the appellee's petition for rehearing, and the briefs of the appellee filed in said Appellate Court, and the dissenting opinion of Judges Henley and Wiley (67 N. E. Rep 468), be considered by the Supreme Court in support of this application.

L. C. WALKER AND
BAKER & DANIELS,
Attorneys for Appellee and Applicant, Harry B. Gates.

In the Supreme Court of Indiana.

No. 20490.

JACOB NEWMAN and SALMON O. LEVINSON, Surviving Partners of the Firm of Newman, Northrup & Levinson, Appellants,

vs.

HARRY B. GATES, Appellee.

Appellants' Petition for a Rehearing.

The said Jacob Newman and Salmon O. Levinson, surviving partners of the late firm of Newman, Northrup & Levinson, composed of the appellants and one George W. Northrup deceased, respectfully petition the Court for a rehearing in the above entitled cause on the following grounds and each of them, namely:

1. That the Supreme Court erred in holding that "as said cause of action (appellee's cause of action set up in his counter-claim) could have been revived against the personal representative of said Northrup under section 272 (271) *supra*, it follows under the provisions of section 648, *supra*, that such personal representative was a necessary party appellant to the appeal and should have been made a co-appellant and served with notice." And that, "on account of the failure to make the personal representative of George W. Northrup, Jr., a co-appellant the Court has no jurisdiction to determine the case upon its merits. The appeal must therefore be dismissed."

2. That the Supreme Court erred in assuming a fact which does not appear in the record namely; that George W. Northrup, Jr., deceased, left assets in the State of Indiana, or that subsequent to his death assets of such intestate have come into the State of Indiana.

3. The Supreme Court erred in holding that under Section 272, Burns' R. S. 1901 (271 R. S. 81) a cause of action which survives could have been revived against the personal representative of said Northrup, it appearing in the record that Northrup died a non-resident of the State of Indiana, and there being no evidence in the record that there was an administrator or executor appointed for his estate, or that he left any assets of any kind or nature, either in this state or elsewhere, or that subsequent to his death assets belonging to said decedent's estate have come into this state.

4. That the said Supreme Court erred in denying full faith and credit to the record and judicial proceedings of the Circuit Court of Cook county, State of Illinois, in violation of Article 4, Section 1, of the Constitution of the United States, in this, to-wit:

(*a.*) That whatever issues of fact and law were or might have been litigated between the parties under the issues as formed in the suit in Cook County, Illinois, are *res adjudicata* and merged in the judgment in that case.

(*b.*) That as a question of law this Court is bound to adjudge that under the issues as shown in the record to have been framed in the Circuit Court of Cook county, Illinois, between the parties to this

suit in the action wherein the judgment sued upon was recovered, any cause of action which the appellee, Harry B. Gates may have had against the partnership of Newman, Northrup & Levinson, or the individual partners thereof, for breach of contract of employment as attorneys, was adjudicated by the said judgment in the Circuit Court of Cook County, and therefore said Gates had no cause of action against either or any of the members of the partnership of Newman, Northrup & Levinson, which would survive, and consequently there could be no defect of parties appellant by the failure to join the personal representative of George W. Northrup, Jr., deceased.

(*c.*) That by holding as it has held in its opinion, that the cause of action which is the subject of appellee's counter-claim was not adjudicated by the judgment sued upon, this court has failed to give to said judgment that force and effect which it has between the parties in the state wherein it was rendered, to-wit: the State of Illinois, and thereby has denied full faith and credit to said judgment, contrary to and in violation of Article 4, section 1, of the Constitution of the United States; and that if this Court gives full faith and credit to said judgment and holds that said cause of action of appellee is adjudicated by said judgment, then it must follow that said appellee has no cause of action which would require that Northrup's personal representative be made part*ies* to this appeal, and the judgment dismissing this appeal is erroneous.

Respectfully submitted,

CHARLES MARTINDALE,
Attorney for Appellants.

W. A. KETCHAM,
Of Counsel.

In the Supreme Court, State of Indiana.

I, Robert A. Brown, Clerk of the Supreme Court and *ex-officio* Clerk of the Appellate Court of the State of Indiana, hereby certify that the above and foregoing are full, true and complete copies of appellee's application for transfer to the Supreme Court, filed on the 16th day of July, 1903, and appellants' petition for a rehearing, filed on the 4th day of February, 1905, in the case of Jacob Newman and Salmon O. Levison, surviving partners, etc. *vs.* Harry B. Gates, as appears from the originals now on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, this 10th day of September, 1906.

[Seal Supreme Court, State of Indiana.]

ROB'T A. BROWN, *C. S. C.*

[Endorsed:] File No. 19940. Supreme Court U. S., October Term, 1906. Term No. 137. Jacob Newman *et al.*, pl'ffs in error, *vs.* Harry B. Gates. Stipulation and addition to record. Filed Sept. 17th, 1906.

FILE COPY.

Supreme Court of the United States

Office Supreme Court, U. S.
FILED.
NOV 30 1906
JAMES H. McKENNEY
CLERK

OCTOBER TERM, A. D. 1906.

JACOB NEWMAN ET AL.,
Plaintiffs in Error,

vs.

HARRY B. GATES,
Defendant in Error.

No. 137.

Error to the Supreme Court of Indiana.

MEMORANDUM FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

S. S. GREGORY,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

JACOB NEWMAN ET AL.,
Plaintiffs in Error,

vs.

HARRY B. GATES,
Defendant in Error.

No. 137.

Error to the
Supreme Court of Indiana.

Memorandum for Plaintiffs in Error in Opposition to Motion to Dismiss or Affirm.

The learned counsel for the defendant in error have noticed a motion to dismiss or affirm for Monday, the 3rd day of December.

The record in this case was filed October 23, 1905.

It is quite apparent that, in the ordinary course the case will be called for argument either during the week beginning December 3rd or the week following. I venture to submit that this court ought not to entertain the motion thus made at this late day; a motion which does not seem to be calculated to expedite the final decision of the cause and which has been thus delayed for appreciably more than a year since the filing of the record.

The only effect of taking this motion now and disposing of

the case upon it, would be to deprive the parties of the opportunity for oral argument; and that too in a case of such a character that, while not without its difficulties on the jurisdictional question, is so obviously destitute of merit, so far as the contention of the defendant is concerned, that, if this court entertains jurisdiction, it would seem that reversal with a direction to enter judgment in favor of the plaintiffs must be inevitable.

My learned associate, Mr. Martindale of Indianapolis, has filed an exhaustive brief dealing fully with the jurisdictional question raised and with the merits of the case. The two questions are so inextricably involved together that it is quite impossible to dispose of either without some consideration of both. I had supposed that under such circumstances, it was almost a matter of course for the court to reserve the motion to dismiss until the argument of the cause, even where such motion is seasonably interposed, except in cases where this court was so obviously without jurisdiction that the question did not admit of fair debate.

In view of this situation, it is not my purpose to attempt any discussion of the ingenious and specious arguments submitted by the learned counsel in support of their motion. The practical result of their position is, that a judgment rendered by a court of competent jurisdiction in Illinois, where both parties have appeared and the matter has been contested, is entitled to no faith and credit under the Constitution of the United States in the courts of the adjoining State of Indiana, and that matters thus litigated in one state can be re-opened and entirely set at large when the judgment is sued over in another state.

I am aware that this is sought to be justified upon various

grounds, but principally upon the ground that the Supreme Court of Indiana in disposing of this case held that the statutory procedure necessary to be followed in prosecuting an appeal where judgment had been rendered on a claim against the appellants had not been pursued. But before this question can be reached it must be determined whether or not any such claim exists. I do not intend by this statement; that this is necessarily true if a *bona fide* or plausible claim not involved in the federal question presented be asserted; and that this court, in a case of that character, would be entitled to hear the federal question involved. But an examination of this record will show that this claim is one so destitute of merit and even of plausibility, that it can furnish no pretext for such an evasion of the real and federal question presented. Such was the opinion of the intermediate court of appellate jurisdiction in Indiana, which reversed the judgment against plaintiffs in error on the merits and because the evidence adduced by the defendant under his spurious counter-claim did not even tend, as a matter of law, to establish any claim. This court can do no less than apply to such frivolous, sham and audacious efforts to defeat rights secured by the Constitution of the United States and which may well be regarded as making a case inherently federal in its character, the same rule which has been so often invoked and recognized by this court when an appeal is made to its jurisdiction to revise the judgments of the tribunals of the States upon the ground that they have disregarded some federal right, privilege or immunity.

It is not the fact that a party makes a claim, but that it has some plausibility and some reasonable foundation, that entitles it to be regarded by the courts.

It is the recognized law of England that the courts will go so far as to dismiss a sham suit in advance of any hearing on the merits; a jurisdiction to be sparingly exercised but existing nevertheless.

The rule that this court has adopted in the class of cases to which I refer is well stated by Mr. Justice White in the recent case of *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311. He there said:

"Stated in another form, the doctrine thus declared is that although in considering a motion to dismiss it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for real controversy, the motion to dismiss will prevail."

He distinctly states, however, that this does not apply to cases where the subject-matter of the controversy is *per se* and inherently federal. I divert the discussion to say that that language might not inaptly be applied to the subject-matter of this controversy; for here the plaintiffs asserted a right referable to the Federal Constitution of such a character that, as I understand the law, had the amount involved been sufficient, it might have been in itself the basis for an appeal to the original jurisdiction of a Circuit Court of the United States.

In a subsequent case Mr. Justice Brewer, speaking for the court and quoting from former decisions, said:

"A real and not fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts. (Citing cases.) In the latter case it was said that the bare averment of the federal question is not in all cases sufficient. It must not

be wholly without foundation. There must be at least color of ground for such averment; otherwise, a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay." *Sawyer* v. *Piper*, 189 U. S. 154–157.

I venture to suggest, without argument, another view. The case made by the defendant on motion to dismiss is not merely the case that would arise had the plaintiffs in error omitted to observe, in taking their appeal from the judgment of the trial court, something required by the local law or practice of Indiana, of such character that the appellate tribunals of that state wholly failed to acquire jurisdiction to look into the merits of the case; and then, after a ruling by the Supreme Court of the state to that effect, the case came here.

There is an element present and wholly omitted from this statement, which is controlling. The particular defect, in the steps taken by the plaintiffs to perfect their appeal, is held by the Supreme Court of Indiana to be, that they failed to make the personal representatives of their partner, who died after judgment in this case, parties on the appeal, this being required by the statutes of that state where surviving partners prosecute an appeal in respect of a claim against themselves and a partner thus dying.

But the plaintiffs in this case contend, as matter of law, as indeed the Appellate Court which examined the merits of the case held, that, on the whole case, the judgment sued on sweeps away every vestige of defendants' claim and is a complete bar and adjudication in respect of every matter which the evidence on the trial below tended to prove as a basis for such claim. The question thus raised is one ultimately for this court; and the de-

cision of that question by this tribunal cannot be foreclosed by the courts of the state, when, under the guise of deciding a question of local law or practice, they hold that because such a judgment is not entitled, under the organic law of the nation, to such conclusive effect, therefore some requirement of local practice on appeal must be met by parties bringing a case here to review their determination; and that by the failure to observe this requirement, neither the courts of the state nor this court can reexamine the federal question involved. *Rogers* v. *Alabama*, 192 U. S. 226.

The effect of the judgment sued on in the courts of Indiana is ultimately, under the Federal Constitution, in so far as it is matter of law, a question for this court. The courts of Indiana are competent to decide it, but their decision is not final, nor can they make it so by giving to the judgment in question a limited recognition, instead of full faith and credit; and then declare that, because its effect is thus limited, the rights of the parties, either in respect of the merits or of procedure, must be varied accordingly.

In matters of federal cognizance, state lines are vanishing lines; and the jurisprudence of the nation will not be completely rounded out nor its inherent and sovereign powers fully recognized and established until, in respect of all such matters, these lines have entirely disappeared.

Much has been said about the law of Illinois in this case. The position of plaintiffs rests upon no theory that the law of Illinois is other than the common law in this regard. It is certainly a conservative application of the doctrine of *res adjudicata*, as it obtains under the common law of this country, to say that

matters tried out and adjudicated in one case are not open to re-examination, in a suit at law, brought on a judgment thus recovered. That is sufficient for the purposes of the question before the court; and in the courts of Indiana, without proof, that would be presumed to be the law of Illinois.

The plaintiffs asserted an important right arising under the national Constitution. A decision upon it was evaded at the suggestion, by the defendant, of a sham and frivolous claim wholly wanting in merit and lacking even in plausibility. If it be that this court must recognize such disparagement of constitutional right, owing to the limitations upon its powers found in its organic law, that ought not to be done except upon the fullest discussion and the most careful consideration.

I respectfully suggest that the motion to dismiss or affirm should be held until the argument of this cause.

Respectfully submitted,

S. S. GREGORY,

Counsel for plaintiffs in error.

December, 1906.

FILE COPY.

—IN THE—

Supreme Court of the United States.

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OCTOBER TERM, A. D. 1906.

JACOB NEWMAN AND SALMON O. LEVINSON, SURVIVING PARTNERS OF THE FIRM OF NEWMAN, NORTHRUP & LEVINSON,
Plaintiffs in Error,

vs.

HARRY B. GATES,
Defendant in Error.

No. 137.

Error to the Supreme Court of Indiana.

Brief for Plaintiffs in Error.

CHARLES MARTINDALE,
Attorney for Plaintiffs in Error.

S. S. GREGORY,
Of Counsel.

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Error to the Supreme Court of Indiana.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

Newman, Northrup & Levinson were a firm of lawyers in the City of Chicago. Gates is a citizen and resident of Indiana. Gates employed Newman, Northrup & Levinson as his attorneys in a proceeding in the Circuit Court of Lake County, Illinois, being a voluntary assignment for the benefit of creditors of the American Mortar Company, in which Gates was trustee. The preferential mortgages held and manipulated by Gates's father,

apparently with the co-operation of the defendant himself, exhausted the estate and Gates refused to pay the attorneys their fees. On June 19, 1893, in the Circuit Court of Cook County, Illinois, they recovered a judgment for $1,300 in an action in assumpsit against Gates for their fees. In that action he appeared and resisted a recovery upon, among other things, the same grounds which he urged below when the judgment was sued over in Indiana.

The present action was brought to the Superior Court of Marion County, State of Indiana, on that judgment of the Circuit Court of Cook County, Illinois. The complaint (Rec. p. 5.) was in one paragraph, alleging the recovery of the judgment in Illinois, its date and amount, that it was unpaid and praying judgment thereon. The defendant in error filed a counter-claim (Rec. pp. 7–12).

The counter-claim alleges substantially that the defendant in error, expecting to become assignee of the American Mortar Company, a corporation, which had been engaged in business in the City of Chicago, and owned a plant, including real estate and boats, which were located in the City of Waukegan, State of Illinois, retained the plaintiffs in error to look after, direct and control all legal matters of whatever kind and nature it would be necessary and proper for him as such trustee to have looked after, directed and controlled by a competent lawyer or lawyers (Rec. pp. 7–8, f. 12); that the plaintiffs in error undertook the employment, and the defendant in error relied solely upon their advice and counsel (Rec. p. 8, f. 13); that the plaintiffs in error never informed defendant in error that it was the law in the State of Illinois that a trust estate could only be made

liable for the payment for legal services rendered any trustee by a formal order, duly entered, authorizing the employment of a lawyer for the rendition of such services, and that he did not know such to be the law (Rec. p. 8, f. 13); that plaintiffs in error failed to procure any such order (Rec. p. 8, f. 13); that plaintiffs in error sued defendant in error and by reason of the fact that no such order ever was made by the court, recovered judgment against defendant in error personally (Rec. pp. 9–10); that the judgment so obtained is the judgment sued on in this action; that the neglect of the plaintiffs in error to obtain such an order and the neglect to inform defendant in error that such order was necessary for his protection was the sole cause of rendition of said judgment against defendant in error; that after the payment of preferred claims and upon dismissal of said assignment proceedings there were no assets of the American Mortar Company in the hands of the defendant in error, out of which he could re-imburse himself for the amount of said judgment for attorney's fees (Rec. p. 9–16); that an order of sale of the assets of said American Mortar Company was procured; that defendant in error was present at said sale; that plaintiffs in error were present at said sale; that defendant in error cried the sale; that a bid of $5,300 was made and the property was struck off to said bidders; that said bidders were unable to make good their bid; that defendant in error was then advised to re-offer the property, which he proceeded to do; that a responsible bidder, one O'Brien, bid for the property; that plaintiffs in error bid a higher sum; that O'Brien challenged the right of plaintiffs in error to bid for the property, and refused to bid further. The plaintiffs in error bid

$3,000 for the assets, and defendant in error struck off the property to plaintiffs in error and received a check from them in payment of their bid. That when the bid was reported to the Circuit Court, having jurisdiction of the assignment, it appeared that mortgagees had taken possession of the property under their mortgages, and defendant in error could not deliver it, and plaintiffs in error were relieved from their bid; that by reason of the misconduct of plaintiffs in error in bidding for the property defendant in error was prevented from making a sale to O'Brien, which would have enabled defendant in error to pay all his charges as trustee; that by the failure of plaintiffs in error to procure an order of court, relieving defendant in error of personal liability, and by reason of their misconduct of bidding at the sale of the assets, defendant in error was damaged to the sum of $2,500. (Rec. pp. 10–11.)

To this counter-claim plaintiffs in error filed an amended reply (Rec. p. 14), setting forth the proceedings in the Circuit Court of Cook County, Illinois, in the action by plaintiffs in error against defendant in error, wherein the judgment sued on was recovered (Rec. pp. 14–24); also pleading the statutes of Illinois, permitting the amendment of pleadings and the statute of amendments and jeofails; also pleading the law of the State of Illinois that in an action of assumpsit for work and labor *quantum meruit* the defendant may prove, under the general denial, any and all facts which would entitle him to damages against the plaintiff for the negligent and wrongful manner in which he performed such services (Rec. p. 25); and pleading that at the trial of the action in the Circuit Court of Cook County, wherein the judgment against defendant in error was rendered,

the defendant in error, in his defense, offered evidence in support of the causes of action set forth in his counter-claim, and that the causes of action set forth in said counter-claim were litigated and determined in said action in the Circuit Court of Cook County, and that said causes of action set forth in said counter-claim had been adjudicated between the parties in the former judgment sued upon (Rec. pp. 25–26). Plaintiffs in error also filed a reply of general denial (Rec. p. 26).

The cause was submitted for trial and the court, holding that all the matters set up in defendant's counter-claim were adjudicated by the judgment sued on, instructed the jury to find for plaintiffs and a verdict was returned accordingly (Rec. pp. 28–29).

Defendant appealed to the Appellate Court of Indiana, and the cause was reversed (Rec. p. 34, f. 52).

Gates v. *Newman*, 18 Ind. App. 392.

The Appellate Court held that the defendant's counter-claim stated matters which constitute something more than a mere defense to the plaintiffs' action in assumpsit for services, brought in Cook County, and, therefore:

"It follows that it cannot be said that under the general issue the matter was necessarily adjudicated. If it was *in fact* adjudicated, it cannot be litigated again; but whether it was in fact so adjudicated must be determined upon the trial."

Gates v. *Newman*, supra, p. 412.

The cause was again tried upon the issues joined upon the complaint and the counter-claim and the reply thereto (Rec. pp. 34–53), resulting in a verdict in defendant's favor for $184.74. (Rec. p. 53.)

The court rendered judgment in favor of defendant on the verdict, and from that judgment plaintiffs appealed to the Appellate Court of Indiana (Rec. p. 57, f. 88).

The Appellate Court reversed the judgment below (Rec. p. 324, f. 562), saying *inter alia* (Rec. p. 323, bottom line to p. 324, end of f. 562):

"It is shown by the evidence without conflict that all matters in relation to the alleged misconduct of the plaintiffs in bidding at the sales of the assets of the trust estate were presented upon the trial in which the original judgment was rendered. Having been once judicially considered, they cannot be a second (time) litigated.

The employment by the defendant of the plaintiffs was a single employment. They brought their action to recover for services rendered therein. In that action it was incumbent upon them to set up their entire claim. They could not have one judgment and thereafter, in any form, obtain a further judgment on account of some overlooked item.

The defendant had the option of presenting his claim, on account of the alleged misconduct, in the action brought against him or to set it up subsequently. When he chose to litigate the subject it devolved upon him to present each item involved therein.

Neither party had the right to split up his cause of action; if they had, there might be as many law suits as there were items in their respective claims. *Hoover* v. *Kilander*, 135 Ind. 600.

The principle announced in *Fischli* v. *Fischli*, 1 Blkf. 360, often approved and never doubted, is directly applicable.

The subject of the counter-claim having been involved in the prior action, the judgment then rendered is conclusive, and the jury should have been so instructed. The wisdom of the rule is illustrated by the facts of this case. It is established without conflict that the counter-claim, in so far as it counts upon a failure to procure an order relative to attorneys' fees prior to the final settlement of the trust is entirely without foundation.

The cause was submitted to the jury upon the question of appellant's negligence in failing at the final settlement to procure an order charging the estate with attorneys' fees, before the assets thereof were permitted to go out of court, a breach of duty not described or set up in the counter-claim.

An essential condition of the alleged wrong was that the relation of attorney and client existed between the parties at the time of the discharge. The evidence upon this subject, a disputed one at this time, was heard in the original trial."

Appellee's petition for a rehearing was overruled. (Rec. p. 327, f. 567.)

On appellee's petition the Supreme Court of Indiana removed the cause from the Appellate Court to that court for decision. (Rec. p. 328, f. 568.)

Upon consideration the Supreme Court dismissed the appeal upon the ground that the personal representative of Northrup, who had died before the appeal was taken from the judgment of the Superior Court, had not been made a party, and on account of the failure to make the personal representative of Northrup a co-appellant the court had no jurisdiction to determine the case upon its merits. (Rec. pp. 328–331.)

After the reversal by the Appellate Court, the removal into the Supreme Court of the State of Indiana, and the opinion of the latter court dismissing the appeal for defect of parties, appellants (the plaintiffs in error) filed a petition for rehearing (Stipulation and Addition to Record, p. 4).

In appellants' petition for a rehearing its fourth cause, relied upon as grounds for a rehearing, was as follows:

"4. That the said Supreme Court erred in denying full faith and credit to the record and judicial proceedings of the Circuit Court of Cook County, State of Illinois, in violation of Article 4, Section 1, of the Constitution of the United States, in this, to-wit:

(a.) That whatever issues of fact and law were or might have been litigated between the parties under the issues as formed in the suit in Cook County, Illinois, are *res adjudicata* and merged in the judgment in that case.

(b.) That as a question of law this court is bound to adjudge that under the issues as shown in the record to have been framed in the Circuit Court of Cook County, Illinois, between the parties to this suit in the action wherein the judgment sued upon was recovered, any cause of action which the appellee, Harry B. Gates, may have had against the partnership of Newman, Northrup & Levinson, or the individual partners thereof, for breach of contract of employment as attorneys, was adjudicated by the said judgment in the Circuit Court of Cook County, and, therefore, said Gates had no cause of action against either or any of the members of the partnership of Newman, Northrup & Levinson which would survive, and consequently there could be no defect of parties appellant by the failure to join the personal representative of George W. Northrup, Jr., deceased.

(c.) That by holding as it has held in its opinion, that the cause of action which is the subject of appellee's counter-claim was not adjudicated by the judgment sued upon, this court has failed to give to said judgment that force and effect which it has between the parties in the state wherein it was rendered, to-wit: the State of Illinois, and thereby has denied full faith and credit to said judgment, contrary to and in violation of Article 4, Section 1, of the Constitution of the United States; and that if this court gives full faith and credit to said judgment and holds that said cause of action of appellee is adjudicated by said judgment, then it must follow that said appellee has no cause of action which would require that Northrup's personal representatives be made parties to this appeal, and the judgment dismissing this appeal is erroneous."

On June 21, 1905, this petition was overruled (Rec., p. 331), whereupon the writ of error from this court was sued out.

The petition for writ of error to this court and the Assignment of Errors accompanying the same were filed in the Supreme Court of Indiana October 3, 1905 (Rec., pp. 332–335).

On the same date the order allowing the writ of error was made by the Chief Justice of the Supreme Court of Indiana (Rec., p. 335), and the bond was fixed at $500.

On the same day the bond was approved and filed (Rec., p. 336), and the writ issued and lodged with the Clerk of the Supreme Court of Indiana, and a copy thereof for the defendant in error. (Rec., 337.)

ERRORS ASSIGNED.

The errors assigned are as follows (Rec., p. 332):

The Supreme Court of Indiana erred in holding and deciding:

"1. That the counter-claim set up by appellee Gates, the defendant in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States.

2. That the appellee's counter-claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrup & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana, nor the Supreme Court of the State of Indiana, had jurisdiction to determine the appeal, and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court

necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, Section 1, of the Constitution of the United States, that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' which adjudication was adverse to appellants' claim under said provision of the Constitution of the United States."

Points of Argument.

THE FEDERAL JURISDICTION.

I.

Undoubtedly the general rule is that where a judgment of the state court rests upon an independent separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court expressly to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.

If the federal right or immunity set up would require that judgment should have been rendered for the plaintiffs in error that result could not be avoided merely by silence on the federal question and by placing the judgment on some principle of the local law. The constitutional grounds relied on must, if sus-

tained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties.

Chicago, B. & Q. R. Co. v. *Illinois*, 200 U. S. 561.

West Chicago St. R. Co. v. *Illinois*, 201 U. S. 506.

Terre Haute etc. R. R. Co. v. *Indiana*, 194 U. S. 579.

Yazoo & M. R. Co. v. *Adams*, 180 U. S. 1.

Chapman v. *Goodnow*, 123 U. S. 540.

Insurance Co. v. *Needles*, 113 U. S. 574.

The claim of a federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it.

II.

Where the federal question was properly set up and relied upon and was necessarily involved in the decision of the cause, although the state court was silent on the federal question and placed its judgment upon a point of local law, the necessary effect of which was to deny the federal right and immunity specially set up and claimed, this court will not sustain a motion to dismiss or affirm, unless such federal question is (1) wholly formal, or (2) so absolutely devoid of merit as to be frivolous, or (3) has been so explicitly foreclosed by a decision of this court as to leave no room for real controversy.

Equitable Life v. *Brown*, 187 U. S. 308.

III.

The jurisdiction of this court is not defeated because it may appear upon examination of the federal question that the decision upon the merits should be adverse to the plaintiffs in error.

Insurance Co. v. *Needles*, supra.

C. B. & Q. R. Co. v. *Illinois*, supra.

West Chicago St. R. Co. v. *Illinois*, supra.

IV.

No particular form of words or phrases has ever been declared necessary in which the claim of federal right must be asserted. It is sufficient if it appears from the record that such rights were specially set up and claimed in the state court in such manner as to bring them to the attention of that court. If, from the whole record, this court is able to see clearly that the title, right, privilege and immunity under Article 4, Section 1, of the Constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, was set up and claimed in the state court and relied upon by the plaintiffs in error, and that the necessary effect of the decision of the state court was to deny that right, the federal question is sufficiently presented.

Green Bay, etc., v. *Patten Paper Co.*, 172 U. S. 58.

National, etc., Loan Assn. v. *Braham*, 193 U. S. 635.

Jacobs v. *Marks*, 182 U. S. 583.

Huntington v. *Attrill*, 146 U. S. 657.

Farmers, etc., Co. v. *Dobney*, 189 U. S. 301.

The right to the protection of Article 4, Section 1, of the Constitution of the United States was set up and claimed in the trial court repeatedly, as follows:

On the second trial, wherein the judgment appealed from was rendered, the defendant withdrew his general denial (Rec. p. 34), which left the issues standing for trial only upon the complaint and defendant's counter-claim and reply thereto. As the counter-claim admitted the allegations of the complaint the defendant had the burden and the trial was upon the allegations of the counter-claim.

1. The defendant offered in evidence a transcript of all the evidence given at the trial of the suit brought in the Circuit Court of Cook County by the plaintiffs against the defendant, wherein the judgment sued upon was rendered. (Rec. pp. 74–75.) To this evidence the plaintiffs objected.

"For the reason that it already appears from the testimony (the evidence that has been introduced by the defendant), that there was a trial and adjudication of this matter in the Circuit Court of Cook County, Illinois, and that it is not competent under the provisions of Article 4, Section 1, of the Constitution of the United States to impeach or contradict or to attempt to impeach or contradict the force, effect and scope of that judgment by parole proof, which this is. That Article, as your Honor is aware, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the plaintiffs object for the reason that to attempt to show by parole proof that the matter in question was not adjudicated in the Circuit Court of Cook County, is to deny full faith and credit, as required by the constitutional provision in the Constitution of the United States to a judicial proceeding in the Circuit Court of Cook County, Illinois."

The objection was overruled and the evidence admitted over the objection.

2. At page 155 of the Record plaintiffs objected to the testimony of Warren Hussey on the ground that it was sought by the testimony to vary and contradict the force and effect of the judgment of the Circuit Court of Cook County, Illinois, and to deny full faith and credit to that judgment as required by the Constitution of the United States.

3. Again at page 232 and 233 of the Record, f. 395, plaintiffs objected to the admission of the testimony of Gates, the defendant, as being a denial of full faith and credit and seeking to avoid the force and effect of the judgment in Illinois, which objection was overruled.

4. Plaintiffs at the close of the evidence moved the court to direct a verdict for plaintiffs, which was refused. (Rec. pp. 36–37).

5. The plaintiffs requested the court to instruct the jury, as follows:

"9. The Constitution of the United States provides that full faith and credit shall be given by each state to the judicial proceedings of every other state. Act 4, Section 1.

In this case the Plaintiffs plead as against the Counter-claim of the defendant, the bar of the judgment obtained in the Circuit Court of Cook County, Illinois, and in determining the evidence in this case, you must give full faith and credit to the Record of such adjudication. If you find it the Law of Illinois that when Plaintiffs sue in *indebitatus* assumpsit upon a *quantum meruit* suit, the burden is upon them of showing that they have rendered services of the value alleged in the complaint, and that upon such allegation a judgment had been recovered by the Plaintiffs, you must take it as conclusive that the services sued for were rendered as the law required them to be rendered and that they

were of the value as found by the judgment in evidence, and therefore, the Defendant is by such record concluded and estopped from saying either that the services were not so rendered or that the services sued for were not properly rendered or that they were not of the value as found and adjudged by the Court, and this you are required to do under the provisions of the Constitution of the United States."

"Refused and excepted to by Plaintiffs this 9th day of December, 1899.

JOHN L. MCMASTER, Judge."

(Rec. p. 43).

6. After the verdict was rendered plaintiffs moved the court to render judgment in their favor notwithstanding the verdict. (Rec. p. 54.)

7. Plaintiffs filed a motion for a new trial (Rec. pp. 55, 56 and 57), in which they alleged the errors above mentioned and others as grounds for a new trial. This motion was overruled by the trial court and judgment rendered against the plaintiffs upon the verdict (Rec. p. 57), whereupon the plaintiffs appealed.

In the Appellate Court these errors were fully argued and the protection of the Constitution of the United States insisted upon, and the Appellate Court reversed the judgment of the court below, using language already quoted, but material here, and therefore repeated for convenience:

"It is shown by the evidence without conflict that all matters in relation to the alleged misconduct of the plaintiffs in bidding at the sales of the assets of the trust estate were presented upon the trial in which the original judgment was rendered. Having been once judicially considered, they cannot be a second (time) litigated. The employment by the defendant of the plaintiffs was a single employment. They brought their action to recover for services rendered therein. In that action it was incumbent upon them to set up their entire claim. They

could not have one judgment and thereafter, in any form, obtain a further judgment on account of some overlooked item.

The defendant had the option of presenting his claim, on account of the alleged misconduct, in the action brought against him or to set it up subsequently. When he chose to litigate the subject, it devolved upon him to present each item involved therein.

Neither party had the right to split up his cause of action; if they had, there might be as many law suits as there were items in their respective claims. *Hoover* v. *Kilander*, 135 Ind. 600.

The principle announced in *Fischli* v. *Fischli*, 1 Blkf. 360, often approved and never doubted, is directly applicable.

The subject of the counter-claim having been involved in the prior action the judgment then rendered is conclusive and the jury should have been so instructed. The wisdom of the rule is illustrated by the facts of this case. It is established without conflict that the counter-claim in so far as it counts upon a failure to procure an order relative to attorney fees prior to the final settlement of the trust is entirely without foundation."

(Rec. pp. 323–324.)

Again upon appellants' petition for a rehearing in the Supreme Court the federal right was set up and claimed. (Stipulation and Addition to Record, pp. 4–5.)

V.

The Supreme Court of Indiana held that the defendant in error, Gates, had a valid counter-claim against the plaintiffs in error, notwithstanding the judgment of the Circuit Court of Cook County sued upon by the plaintiffs in error. It held that, so far as the judgment of the Circuit Court of Cook County, Illinois, was concerned, the title to that cause of action, upon the death of Northrup, one of the partners in the firm of Newman, Northrup & Levinson, passed to the surviving partners, New-

man & Levinson, and they were the only necessary parties plaintiff and parties appellant. (Rec. p. 330, line 1–7.) But it held that the counter-claim of the defendant in error stated a valid cause of action against all the members of the copartnership of Newman, Northrup & Levinson, and that on an appeal from a judgment on that counter-claim the personal representative of Northrup, deceased, was a necessary party, and that failure to join such personal representative must result in a dismissal of the appeal. (Rec. p. 330–331.)

It is plain that, if Gates's counter-claim is not valid, but is sham and frivolous, as is most obvious, Northrup's personal representative is not a necessary party to the appeal. It is also obvious, we think, that if full faith and credit be given the judgment of the Circuit Court of Cook County, Illinois, between the parties, Gates had no counter-claim. Hence the decision of the court below necessarily involved the denial of the federal right. Whether due faith and credit were denied by the state court to the judgment of the Circuit Court of Cook County, Illinois, is a federal question which this court has jurisdiction on writ of error to examine.

Crescent City Life Stock etc. Co. v. *Butchers Union etc. Co.*, 120 U. S. 141.

Harris v. *Hardeman*, 14 How. 334.

Jacobs v. *Marks*, 182 U. S. 583.

Huntington v. *Attrill*, 146 U. S. 657.

Jaster v. *Curry*, 198 U. S. 144.

Terre Haute etc. R. R. Co. v. *Indiana*, 194 U. S. 579.

Natl. Foundry & Pipe Works v. *Oconto Water Supply Co.*, 183 U. S. 216.

VI.

This court is not bound by the decision of the state court as to its (the state court's) own jurisdiction, if the ultimate determination of that inquiry involve a federal right or immunity set up and relied on in the state court, merely because the state court has the power to decide as to its own jurisdiction.

Thus in *D'Arcy* v. *Ketchum*, 52 U. S., 11 How. 165, the assumption of jurisdiction over the person of a non-resident of New York by a court of that state under a state statute in relation to joint debtors and the rendition of a judgment was held not to conclude this court, and the judgment was held to be invalid because the state court had no jurisdiction.

Knowles v. *Logansport Gaslight & Coke Co.*, 19 Wall. 58.
Hall v. *Lanning*, 91 U.S. 160.
Pennoyer v. *Neff*, 95 U. S. 714.
Wilson v. *Seligman*, 144 U. S. 41.

So also where there is a conflict of jurisdiction between federal and state courts, as in *Marshall* v. *Holmes*, 141 U.S. 589; and *Bank* v. *Stevens*, 169 U. S. 432.

Also in cases where a removal had been taken from the state court to the federal court, but the state court holds that the right of removal was not made out and that it retains jurisdiction and proceeds to trial and judgment which is affirmed by the Supreme Court of the state, this court reviews the decision of the state court as to its own jurisdiction and may reverse it upon that question.

Stone v. *South Carolina*, 117 U. S. 430.
Carson v. *Dunham*, 121 U. S. 421.

Burlington, etc., R. R. v. *Dunn*, 122 U. S. 513.

Madisonville, etc., Co. v. *St. Bernard Mining Co.*, 196 U. S. 239.

So also in *Andrews* v. *Andrews*, 188 U. S. 14, this court has re-affirmed the rule that where the federal question of "full faith and credit" to the judgment of a sister state has been properly brought into the record in the court below, no matter how it may have been decided by the state court, this court will examine into the record to decide the federal question; that the jurisdiction upon which the judgment depends may be inquired into collaterally and that this court will inquire into the essential nature and real foundation of a cause of action to ascertain whether the claim is really one of such a nature that the court is required to enforce it.

It is precisely that which plaintiffs in error are here asking this court to do. They ask that this court shall examine Gates's counter-claim and, looking into the whole record, say that after the conclusion of the trial between the parties in the Circuit Court of Cook County, Illinois, Gates had no vestige of a cause of action left unmerged in the judgment of that court and nothing upon which to base a counter-claim when sued upon the Illinois judgment in the courts of Indiana; that the "full faith and credit" clause requires this conclusion, and that this conclusion destroys the foundation upon which the decision of the jurisdictional question by the Supreme Court of Indiana rests.

Atherton v. *Atherton*, 181 U. S. 155.

Thompson v. *Whitman*, 18 Wall. 457.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265.

So in *Finney* v. *Guy*, 189 U. S. 335, the court said:

"Without precisely determining just how far questions of this kind can in all cases be regarded as coming under the rule giving full faith and credit to the public acts, records and judicial proceedings of another state, *depending as such questions must, upon the particular facts of each case, and the manner in which they are presented*, we may, nevertheless, examine the contentions of the plaintiffs in error to see how far they are justified in the law."

Upon looking into the record in that case and determining for itself what was the force and effect in the state wherein it was rendered of the judgment in that case relied upon, this court held that there was no cause of action and affirmed the judgment of the state court dismissing the suit.

VII.

The court below, for the purpose of determining its jurisdiction and to that end to ascertain who were the necessary parties to the appeal, had the power to look behind the mere paper case made by the pleading of a counter-claim by defendant in error. Pleadings must be *bona fide* and if, from the record before it, the fact appeared that the counter-claim was a sham defense entitled to no consideration, it could not affect the jurisdiction of that court founded upon the cause of action set up in the complaint to which the surviving partners of Newman, Northrup & Levinson alone were necessary parties appellant. The allegations of the counter-claim did not preclude the court from examining as to whether it pleaded a valid cross-demand to which the personal representative of Northrup was a necessary party.

McElmoyle v. *Cohen*, 13 Pet. 312, 325.

Thompson v. *Whitman*, 18 Wall. 457.

Atherton v. *Atherton*, 181 U. S. 155.

Bell v. *Bell*, 181 U. S. 175.

Streitwolf v. *Streitwolf*, 181 U. S. 179.

Andrews v. *Andrews*, 188 U. S. 14.

Finney v. *Guy*, 189 U. S. 335.

In *Jaster* v. *Curry*, 198 U. S. 144, suit was brought in Nebraska upon a judgment rendered in Ohio. The defendant set up by way of answer that the judgment plaintiff had obtained jurisdiction in Ohio by fraud, the fraud being that the judgment plaintiff had served notice on the judgment defendant to take a deposition in Ohio. While attending there to take the deposition he was served with the process in the case wherein the judgment was rendered. The Nebraska trial court held this to be a good defense and rendered judgment for the defendant. This jugdment was affirmed by the Supreme Court of Nebraska without referring to the federal question, basing its decision upon the law of procedure in Nebraska. This court assuming that a plea that the judgment sued on was obtained by fraud would be a good equitable plea, examined the allegations of the answer and from such examination determined that the facts alleged in the answer did not constitute a fraud; that there was no ground of defense to the jurisdiction of the court rendering the judgment sued on, reversed the decision of the Nebraska court and remanded it with instructions to proceed with the cause.

VIII.

The question of the force and effect of a judgment in the state wherein it was rendered as an adjudication between the parties when raised in a foreign jurisdiction, is not a question of

fact upon which the verdict of a jury is conclusive. This is the position assumed by counsel for defendant in error. (P. 19-20-21. Brief of Defendant in Error on motion to dismiss or affirm.)

The very case which the counsel cite to support that contention destroys it.

In *Finney* v. *Guy*, 189 U. S. 335, this court held that the law of a foreign state as declared by statute and decision is not a fact which being alleged in the complaint is admitted by demurrer. But that the statutes and decisions of the foreign jurisdiction having been presented to the court, the court will for itself adjudge what is the force and effect of a judgment in the state wherein it was rendered.

In that case the judgment of the Wisconsin court was affirmed because the court, from an examination of the statute and decisions of Minnesota, could and did determine that the judgment of the Minnesota court did not have in Minnesota, or elsewhere, the force and effect claimed for it and that the Wisconsin court had properly so held.

Eastern Bldg. & Loan Assn. v. *Williamson*, 189 U. S. 122.
Laing v. *Rigney*, 160 U. S. 531.

IX.

It will be contended by defendant in error that the precise federal question here presented did not and could not have arisen until the Supreme Court had the cause, and that it was presented for the first time on petition for rehearing, and the question is therefore presented too late. We quote from pages 25-26, Brief of Defendant in Error on motion to dismiss or affirm:

"The question of full faith and credit to the judicial records of another state by reference to the article of the Constitution was raised by the objection to the introduction of the record of the proceedings of the Cook County Circuit Court upon that ground, in the trial court, and discussed in the Appellate Court as well as the Supreme Court of the State of Indiana. But the precise question now raised, namely, that the dismissal of the appeal necessarily recognized and determined that the matters presented in the counter-claim of the defendant in error were valid, and were not adjudicated by the judgment of the Illinois Court, 'and, by so deciding, denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between parties in the State of Illinois, where it was rendered, and denies full faith and credit to said judgment, contrary to and in violation of Article 4, Section 1, of the Constitution of the United States, etc., etc.,' was not raised or even suggested at any time in the entire proceedings until plaintiffs in error filed their petition for rehearing, and this notwithstanding the fact that defendant in error insisted upon such dismissal in the Appellate Court, as well as when the case reached the Supreme Court of the State of Indiana, and based his motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon the ground that the Appellate Court decided erroneously that the appeal should not be dismissed."

The defendant in error admits that the federal question was presented both in the Appellate and Supreme Courts, as the same had been raised in the trial court.

He admits the motion in the Appellate Court to dismiss the appeal for defect of parties was overruled by the Appellate Court and the opinion of that court (Rec. pp. 322–323–324).

The substance of that opinion supports our contention that giving full faith and credit to the Illinois judgment, Gates has no counter-claim which required the presence on the appeal record of Northrup's personal representative. As defendant in

error admits, the constitutional right was before the Appellate Court and was the ground of its decision. On removal of petition into the Supreme Court the opinion of the Appellate Court and the arguments on which it was based were before the Supreme Court.

Until the decision of the Supreme Court we could not know upon what ground its decision would be based. We think the constitutional right in respect of the Illinois judgment was fairly before it on the record.

Undoubtedly the Supreme Court of Indiana thought that its decision was based upon a question of local practice not involving a federal question. The petition for rehearing called its attention to the fact that in our opinion it could not thus escape the federal question. Whether it could and did is for this court now to decide.

THE FEDERAL QUESTION.

X.

If the judgment in the Circuit Court of Cook County in the action by Newman, Northrup & Levinson against Gates, is conclusive between the parties thereto in the State of Illinois, where it was rendered, not only as to the cause of action (being the reasonable value of their services as attorneys in the matter of the assignment of the American Mortar Company), but also as to all defenses and counter-claims which Gates, under the issue pleaded, might have interposed to defeat said cause of action, said judgment is equally conclusive in every other state and court in the United States.

Christmas v. *Russell*, 72 U. S. 290.

Mutual Life Ins. Co. v. *Harris*, 97 U. S. 331.
Chew v. *Brumagen*, 80 U. S. 497.
Cheever v. *Wilson*, 76 U. S. 108.
Maxwell v. *Stewart*, 22 Wall. 77; 22 L. ed. 564.

XI.

In Illinois the doctrine of *res judicata* embraces not only what has been actually determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it.

Howell v. *Goodrich*, 69 Ill. 556.
Rogers v. *Higgins*, 57 Ill. 244.
Hanna v. *Read*, 102 Ill. 596.
Bennett v. *Mining Company*, 119 Ill. 9.
Reugger v. *I. & St. L. R. R. Co.*, 103 Ill. 449.
Briscoe v. *Lloyd*, 64 Ill. 33.
Matlock v. *Krome*, 78 Ill. 110.
Garrick v. *Chamberlain*, 97 Ill. 620.
Markley v. *People*, 171 Ill. 260.
Tilley v. *Bridges*, 105 Ill. 336.
Attorney General v. *Railroad Co.*, 112 Ill. 520.
Riverside Co. v. *Townshend*, 120 Ill. 9.
Wright v. *Griffey*, 147 Ill. 496.

Rogers v. *Higgins*, 57 Ill. 244. Rogers brought a suit to enjoin the prosecution of an action in ejectment by Higgins. Higgins set up as a former adjudication, that Rogers had filed a bill in equity to enjoin the prosecution of this same action in ejectment on the ground of an equity in him arising out of an exe-

cution of a contract and deed with Higgins's grantor, and that the decision in that case was adverse to Rogers.

"In avoidance of this it is answered that there was no allegation in the former bill that the lot was the separate estate of Mrs. Wight, so that under the pleadings this question of Rogers's right to the land, because it was the separate estate of Mrs. Wight, could not have been adjudicated in the former suit. Still, the cause of action in the former bill, and in the present, in this respect, is the same, to-wit: that the complainant was entitled to an equity in this property arising out of the execution of the said contract and deed from Mrs. Wight to Rogers, and the present bill, so far as said contract and deed are concerned, is only insisting upon an additional ground in support of the same cause of action. A party cannot have a cause of action adjudicated upon piecemeal in this way.

When the complainant before presented his cause of action before the court he should have brought forward and urged all the reasons which then existed for the support of it. The controversy cannot be re-opened to hear an additional reason which before existed and was within the knowledge of the party in support of the same cause of action.

No one should be twice vexed for the same cause of action. This principle of *res adjudicata* embraces not only what actually was determined in the former case, but also extends to any other matter properly involved and which might have been raised and determined in it. *Stockton* v. *Ford*, 1 Blackf. 360; *Stockton* v. *Ford*, 18 How. (U. S.) 418."

NOTE: The case in 1 Blackford (Indiana) is by misprint given the wrong title. The case in that volume is the leading Indiana case of *Fischli* v. *Fischli*, which decided the same principle, and has become a legal classic.

Briscoe v. *Lloyd*, 64 Ill. 33.

Hanna v. *Read*, 102 Ill. 596, was an action upon a decree in the Circuit Court of Vigo County, Indiana, brought in the Circuit Court of Cook County, Illinois. In sustaining the judgment of

the Indiana court as a complete adjudication the Supreme Court of Illinois said:

"The contention of defendants in error that before an adjudication in a former suit can be made available as an estoppel it must appear that the thing sought to be recovered and the cause of action in both suits are the same, is not universally true. A careful examination of the subject will show there is a diversity in the cases in this respect, which, if kept in view, will satisfactorily explain what would otherwise appear to be irreconcilable statements of different courts of the highest respectability in discussing the law of estoppel by judgment or verdict. Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear as claimed by defendants in error that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment and the judgment itself is commonly characterized as a bar to the action; but where some specific fact or question has been adjudicated and determined in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict and is equally available to a plaintiff in support of his action when the circumstances warrant it as when offered by a defendant as matter of defense. The estoppel relied on in the present case clearly belongs to the class last considered; so it is unimportant whether the cause of action is the same in both cases or not. Although there is the diversity in the two classes of cases we have mentioned it is apprehended there is no material difference in the principle by which they are governed."

The court cites *Cromwell* v. *County of Sac*, in this court (94 U. S. 351), and other cases.

XII.

In Illinois, in a suit in assumpsit under the plea of the general issue, the defendant may prove and recoup any damages sustained by him on account of breach of warranty or malpractice by the plaintiff.

Babcock v. *Trice*, 18 Ill. 420.
Murray v. *Carlin*, 67 Id. 286.
Howell v. *Goodrich*, 69 Id. 556.
Cook v. *Preble*, 80 Id. 381.
Addams v. *Suver*, 89 Id. 482.

XIII.

In Illinois, where an action in assumpsit for the value of professional services is brought, to which the defendant pleads the general issue and goes to trial, any cause of action for malpractice in the rendition of the service which the defendant might have had is forever barred by a judgment in favor of the plaintiff.

In *Howell* v. *Goodrich*, 69 Ill. 556, Goodrich brought an action against Howell and Angell, physicians, to recover damages for malpractice by the defendants as physicians in setting the broken arm of the plaintiff's infant son. The defendants prior to the bringing of this action, had sued Goodrich before a justice of the peace for their professional services in the case, the amount claimed being $25 which amount they recovered in full. Goodrich had judgment below and Howell appealed. The Supreme Court held that the judgment had before the justice of the peace was a complete defense to the action of Goodrich, saying:

"It is said that a portion of the damages are for expenses of treatment of the boy's arm and loss of service accrued after the judgment before the justice, and that the evidence in respect thereto should appear, it being supposed that a fresh action would lie therefor, even if one would not lie for the damages which had accrued before the judgment. But such a distinction cannot be maintained. For such a cause of action, as the one sued on, there cannot be successive suits brought from time to time as damages may in the future be suffered, but the recovery is once for all and may embrace prospective as well as accrued damages. The failure before the justice to get any allowance made by way of recoupment for that portion of the damages which had up to that time accrued on the ground that no malpractice had been committed would preclude any future action for subsequently accruing damages, for the reason that it had once been decided that there was no cause of action for damages and the question could not be re-opened."

XIV.

It is admitted by the court below, in its opinion, that the cause of action of the partnership of Newman, Northrup & Levinson vested in the surviving partners of that firm, on the death of one of them, and in an action thereon personal representatives of Northrup are not necessary parties. (Rec. p. 330, lines 1–7).

The foundation of the court's judgment, dismissing the appeal, is the counter-claim of Gates, which, it holds, states a cause of action which would survive against the deceased partner whose personal representatives are therefore necessary parties on appeal. (Rec. p. 330, line 8 *et seq*).

This assumes that Gates's counter-claim states a cause of action at all; to aver which the court must deny the original judg-

ment sued on by plaintiffs in error the force and effect which it has in Illinois.

XV.

Plaintiffs in error claim that the decision of the Supreme Court of Indiana, dismissing the appeal, was based upon the following premises:

a. Appellee Gates had a valid counter-claim against appellants.

b. The nature of that counter-claim was such that it would survive the death of one of the appellants (defendants to said counter-claim).

c. The personal representative of the deceased member of the partnership was therefore a necessary party to the appeal, and not being made a party the appeal is dismissed for want of jurisdiction.

This decision necessarily involves as one of its postulates that Gates's counter-claim was not adjudicated and extinguished by the judgment of the Circuit Court of Cook County, Illinois, the basis of this action, and so to hold was a denial of that full faith and credit to the judgment of a sister state, to which it is entitled under Article 4, Section 1, of the Constitution of the United States, and denied to the appellants the title, right, privilege and immunity claimed under said constitutional provision.

XVI.

The faith and credit to which the judgment of the Circuit Court of Cook County, Illinois, was entitled in the state wherein it was rendered was made to appear in the reply to the third

paragraph of answer (counter-claim) (Rec. p. 14–26, 2 pp. 25–26), and by the testimony of Frank H. Scott (Rec. p. 270), John C. Mathis (Rec. p. 276), Horace K. Tenney (Rec. p. 283–293), Charles S. Cutting (Rec. p. 297), Edgar B. Tolman (Rec. p. 301).

XVII.

The force and effect to which the judgment of the Circuit Court of Cook County, Illinois, was entitled in the State of Illinois as an adjudication between the parties and as an estoppel by former judgment in a subsequent suit upon the same cause of action between the same parties was controverted by the defendant in error; but the Illinois lawyers produced as witnesses by the defendant all substantially agree with the plaintiffs' witnesses upon the hypothetical questions embracing the facts in the case. The witnesses called by the defendant in error, on this question as to the law of Illinois, were:

Walter S. Horton, Peoria; Thomas F. Tipton, Bloomington; John S. Stevens, Peoria.

Horton concedes that in a suit for services upon *quantum meruit* and *quantum valebat* and defendant's plea of general issue, defendant might show neglect and damages by way of recoupment (Rec. p. 78, Q. 94, and answer), and if he went into such matters in defense, they would in a subsequent case between the parties be *res judicata* (Rec. p. 184, Q. 116 and answer).

Tipton was to the same effect (Rec. p. 198–199, X. Q. 1 to 2 and answers).

Stevens was also to the same effect (Rec. pp. 213–214, X. Q 20 to 30 inc., and answers).

The evidence, therefore, was without conflict as to the force and effect of the Illinois judgment between the parties in the state in which it was rendered. But whether the opinions of the Illinois lawyers were conflicting or not, they are not binding as testimony as to fact supported by a verdict, but are advisory to the court only. The court, as a question of law, was to determine the law of Illinois and the force and effect of the Illinois judgment. Its decision of that question involving, as it does, a constitutional right, this court will review it.

Andrews v. *Andrews*, supra.

Jaster v. *Curry*, supra.

Finney v. *Guy*, supra.

There was no conflict, and could be none as to just what transpired upon the trial between the parties in Illinois, for the transcript of the record and proceedings in the Cook County Circuit Court was introduced in evidence by the defendant in error himself (Rec. pp. 63 to 140 inc.), and it was shown that under the general issue Gates there undertook to prove neglect and misconduct of the plaintiffs to defeat or reduce their recovery. On this evidence the trial court should have directed judgment for plaintiffs, or should have rendered judgment in their favor, notwithstanding the verdict. To refuse to do so was to deny full faith and credit to the Illinois judgment.

XVIII.

At all subsequent stages of the proceedings full faith and credit required that it be held that Gates's counter-claim was *res judicata* and invalid as a defense or as a cross-demand. The appeal by plaintiffs in error, as surviving partners of the copart-

nership of Newman, Northrup & Levinson, is conceded by the Supreme Court of Indiana to have been perfect so far as rights under the judgment in favor of the partnership and against Gates in the Circuit Court of Cook County, Illinois, are concerned. The court in its opinion says: (Rec. p. 330.)

"It is true that after the death of a member of a partnership the surviving partner, or partners, are vested with the exclusive right to possession and management of the partnership property, including the exclusive right to collect the debts due the partnership, by suit or otherwise. Parsons on Partnership, secs. 342–344–345; *McIntosh* v. *Zaring*, 150 Ind. 301–312 and cases cited; *Valentine* v. *Wysor*, 123 Ind. 47–52. * * *

In other words, while rights of action for liabilities due a partnership survive and vest exclusively in the surviving members of the firm, the liabilities of the partnership, on the death of a partner, survive not only against the surviving partners, but also against the estate of the deceased partner."

XIX.

By the cross-complaint itself, and upon its very face, it appears that the cause of action set up therein was adjudicated in the Illinois judgment. (Trans. 9–12.)

A demurrer to this counter-claim was overruled, with exception, and a reply was filed.

This paragraph of the counter-claim distinctly charges plaintiffs with fraudulent misconduct and breach of contract. Thus it is said (Trans. 10):

"That but for the improper and fraudulent conduct of the said Newman, Northrup & Levinson in advising and giving legal advice to the said Harry B. Gates, trustee, as hereinafter stated, there would have been assets, etc."

And again (Trans. 12) it is said:

"Wherefore, this defendant says that by the negligence and fraudulent conduct of the said Newman, Northrup & Levinson, as aforesaid, he was damaged in the sum of $2,500, for which amount he prays judgment, etc."

When the case first went to the Appellate Court of Indiana that court seemed to treat this paragraph of the counter-claim as alleging fraudulent misconduct on the part of the plaintiffs.

Gates v. *Newman*, 18 Ind. App. 392.

The highest standards of good faith, *uberrima fides* of the civilians, is applied in testing the conduct of lawyers towards their clients. If the plaintiffs were guilty of fraudulent conduct in the discharge of any of their obligations to the defendant as alleged in this paragraph of the counter-claim, nothing is better settled than that in an action to recover for services such conduct would entirely defeat their recovery. This has been frequently held in suits brought by agents to recover compensation. This court has announced that doctrine (*Wadsworth* v. *Adams*, 138 U. S. 380) and it has been frequently declared by the United States Circuit Courts of Appeals and other federal tribunals:

Hofflin v. *Moss*, 67 Fed. Rep. 440;

McKinley v. *Williams*, 74 Fed. Rep. 94;

St. Louis, etc., Co. v. *Edison Gen. El. Co.*, 64 Fed. Rep. 997.

In *Prescott* v. *White*, 18 Ill. App. 322, Mr. Justice McAllister laid down what is understood to be the rule in Illinois in clear and perspicuous language. He there said:

"The person who bargains to render services for another is deemed in law to undertake for good faith and integrity in the performance of his duties and is liable in damages to his employer for negligence, bad faith or dishonesty. Not only that, but the law goes further. For gross misconduct in the course of

his agency or intentional frauds upon his principal, he may be held to have forfeited all right to compensation as respects any of the business of the principal into which such fraud or misconduct shall have entered."

While it is undoubtedly true that every breach of contract does not disable the party to whom it is imputed from maintaining an action upon it, the law considering the right of the other contracting party to such damages as he may have sustained by such breach as meeting the justice of the case, yet, where bad faith and fraud have intervened, the rule seems to be well settled in accordance with the authorities just referred to. It would seem to follow as a logical conclusion from this principle that where an action is brought by an agent or a lawyer against his principal or client for the value of services rendered, and he therein recovers judgment, such judgment must, at least, adjudicate his right to recover, and prevent the defendant, in any subsequent suit, from asserting such fraudulent misconduct as, if averred and proved in the suit in which the judgment was obtained, would have conclusively established that the plaintiff had no such right.

That such a defense is admissible under the general issue filed to the common counts in assumpsit at common law and in Illinois is so elementary as to require neither discussion nor the citation of authority.

It is not, of course, necessary for the plaintiffs to rely upon this view; for it is perfectly apparent from the record in this case, and such was the view of the Appellate Court when the record of the trial on which this judgment was obtained was before it, that all of the matters set up and relied upon in this paragraph of the defendant's counter-claim, and proved in this

case, were fully litigated in the Circuit Court of Cook County, Illinois, in the case in which the Illinois judgment was rendered (See, particularly, testimony of Mr. Judd, Trans. 263–264).

It was, therefore, the duty of the court of trial to have recognized the validity of the Illinois judgment, and, after the evidence was all in, to have directed a verdict accordingly.

When the defendant offered evidence in support of this counter-claim plaintiffs objected upon the constitutional grounds. (Rec. p. 75.)

We have elsewhere set forth the manner in which the constitutional question was set up and relied upon in the trial court and in the Supreme Court.

Upon the above state of the record we assert that, as this court did in *Jaster* v. *Curry*, supra, *Finney* v. *Guy*, supra, *Andrews* v. *Andrews*, supra, *Jacobs* v. *Marks*, supra, it may upon this record say that Gates's counter-claim stated a cause of action which was extinguished by the Illinois judgment; that "full faith and credit" required that the Illinois judgment be held to bar Gates's alleged counter-claim; that being so, the personal representative of Northrup was not a necessary party to an appeal, because the plaintiff's cause of action as held by the Supreme Court of Indiana passed to the surviving partners who are all on the record, and the presence of Northrup's personal representative is required solely upon Gates's counter-claim.

Conclusion.

We do not believe that any unprejudiced lawyer can read this record and not be impressed by the fact that the courts of Indiana have worked out a wrong result in this action based

upon the Illinois judgment. We shall not here attempt to account for the action of the Indiana courts; we simply state it as our opinion.

We have applied to this court for redress in good faith, believing that the protection of the Constitution has been properly set up and claimed. While at the first blush the question decided below was apparently one of local law, we have been impressed so strongly with the opinion that, like *Jaster* v. *Curry*, *Jacobs* v. *Marks*, *Andrews* v. *Andrews*, and other cases cited, the local question was rooted and grounded in a federal right and inseparably connected herewith that we have felt justified in claiming the protection of the strong arm of this Honorable Court.

We are neither so ignorant as to be unconscious of the difficulties of the case, nor so unworthy as to attempt in a bad cause to knowingly muddy the waters in hope that we might thus find refuge under the rock of this court's protection, whereas in the clear waters of reason we should be surely netted. The cause is submitted in the confident faith that this tribunal, unswayed by prejudice of race or locality, has the will to work out justice and the wisdom to find the way.

Respectfully submitted,

CHARLES MARTINDALE,

Attorney for plaintiffs in error.

S. S. GREGORY,

Of counsel.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 137.

Office Supreme Court, U.
FILED.
NOV 16 1906
JAMES H. McKENNEY
CLERK

JACOB NEWMAN and SALMON O. LEVINSON,
Surviving Partners of the firm of NEWMAN,
NORTHRUP and LEVINSON,
Plaintiffs in Error.

vs.

HARRY B. GATES, Defendant in Error.

MOTION TO DISMISS OR AFFIRM.

Notice and Brief of Argument Upon the Motions

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Counsel for Defendant in Error for
the Purpose of the Motions.

THE WOOD-CARNAHAN CO., INDPLS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson,
Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

Comes now, Harry B. Gates, defendant in error herein, by Albert Baker, Edward Daniels, Lewis C. Walker and Edward E. Gates, his Counsel, appearing in that behalf and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction because the judgment or decree from which the said Writ of Error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Indiana.

And the said defendant in error, Harry B. Gates, by Counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said Writ of Error purports to have been taken, because, although the

record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said Writ of Error was taken for delay only.

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,

Counsel for the said defendant in error,
Harry B. Gates, for the purposes of
these motions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson, Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

To Messrs. Charles Martindale and S. S. Gregory, Counsel for Plaintiffs in Error.

Please take notice that on the 3d day of December, 1906, at the opening of the Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

ALBERT BAKER.
EDWARD DANIELS.
LEWIS C. WALKER.
EDWARD E. GATES.

Counsel for the said defendant in error, Harry B. Gates, for the purposes of the motions.

Service of the above notice and receipt of the brief of argument of the Defendant in Error in support of the motions, are hereby acknowledged this 9th day of November, A. D. 1906.

CHARLES MARTINDALE,
Attorney for Plaintiffs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

No. 137

Jacob Newman and Salmon O. Levinson,
Surviving Partners of the firm of Newman, Northrup and Levinson, Plaintiffs in Error,

vs.

Harry B. Gates, Defendant in Error.

BRIEF OF ARGUMENT IN BEHALF OF THE DEFENDANT IN ERROR, HARRY B. GATES, UPON MOTIONS TO DISMISS OR AFFIRM.

In order that the grounds of the motions to dismiss or affirm in this case may be intelligently presented, it becomes necessary to make a brief reference to the facts shown in the Transcript of the Record.

STATEMENT OF FACTS.

The Writ of Error was taken by the plaintiffs in error, from a judgment or decree rendered by the Supreme Court of the State of Indiana on December 7, 1904, which was

ordered spread of record on June 21, 1905. (Printed Transcript, pages 328-331.)

The original suit was filed on the 22d day of December, 1893, in the Marion Superior Court of the State of Indiana. (Transcript, page 4.) This was a suit upon a judgment alleged to have been rendered by the Circuit Court of Cook County in the State of Illinois, on the 19th day of June, 1893. The amount of the judgment sued upon was One Thousand Three Hundred (1,300.00) Dollars. The original plaintiffs were Jacob Newman, George W. Northrup, Jr., and Salmon O. Levinson. (Transcript, page 5.)

The defendant in error, Harry B. Gates, filed his answer (Transcript, pages 6-12), the third paragraph of which was a counter-claim against said plaintiffs; this counter-claim was held upon demurrer to state a cause of action against the original plaintiffs. (Transcript, page 13.) Issues were joined. Trial was had to a jury, resulting in a verdict for the original plaintiffs in error in the sum of $1,410.98. (Transcript, page 29.)

Defendant in error appealed to the Appellate Court of Indiana, which Court reversed the case and the case was remanded to the Marion Superior Court for a new trial. (Transcript, page 34, and see also opinion of the Supreme Court of Indiana, Transcript, page 329.)

Before the second trial of the case was had the defendant withdrew his first paragraph of answer, a general denial (Transcript, page 34), and the defendant upon the trial expressly admitted the rendition and validity of the

judgment sued upon. (Transcript, page 63.) Trial resulted in a verdict for the defendant in error, in excess of plaintiff's judgment, for $184.74. (Transcript, page 57.) After the rendition of said judgment, and before the Appeal was taken, one of the original plaintiffs, to wit, Geo. W. Northrup, Jr., died (Transcript, page 58), and the plaintiffs in error, Jacob Newman and Salmon O. Levinson, as surviving partners of the firm of Newman, Northrup and Levinson, attempted to take an appeal, in vacation, to the Appellate Court (Transcript, page 59; see also opinion of the Supreme Court of Indiana, Transcript, page 329), and failed to make the personal representative of the deceased partner a party to the appeal.

The Appellate Court reversed the case with instructions to sustain the motion for a new trial. (Transcript, page 324.) Appellee duly petitioned to remove the case to the Supreme Court of Indiana for decision, which petition was granted. (Transcript, page 328.)

Subsequently, on the 7th day of December, 1904, the Supreme Court of Indiana dismissed the appeal:

> "On account of the failure to make the personal representative of George W. Northrup a co-appellant the Court has no jurisdiction to determine the case upon its merits." (Transcript, page 331.)

and judgment was rendered accordingly. Appellants filed a petition for re-hearing (Transcript, page 331), and in this petition, for the first time, raised the precise Constitutional question upon which they rely in the Supreme Court of the United States and this, notwithstanding the

fact that appellee raised the same question of practice in the Appellate Court before the case reached the Supreme Court of Indiana and, in fact, based the motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon that ground. (Printed addition to the Record, page 2, reason numbered I.) The petition for rehearing was overruled by the Supreme Court of Indiana on June 21, 1905, without comment or reference to such constitutional questions referred to in such petition for rehearing. (Transcript, page 331.) The petition for rehearing filed by the appellants will be found on page 4 of the printed addition to the record.

Inasmuch as the opinion of the Supreme Court of the State of Indiana is sought to be reviewed by the Writ of Error, it is deemed advisable to set the opinion out in full at this point, and it is as follows (Transcript, page 328):

> "This action was brought by appellants and George W. Northrup, Jr., on a judgment recovered by them against appellee in the circuit court of Cook County, Illinois, for services as attorney for appellee, performed by them as partners.
>
> Appellee filed a counter-claim alleging certain breaches of duty arising from the relation of attorney and client in connection with the employment of said firm as his attorneys, for which services said Illinois judgment was rendered. The breaches of duty alleged in the counter-claim by appellee were acts of commission and omission by the plaintiffs below as the attorneys for appellee by reason of which he suffered great pecuniary

loss, on account of which he demanded judgment for $2,500.

Said cause was tried and final judgment rendered which was reversed by the Appellate Court. (Gates v. Newman, 18 Ind. App. 392; Newman v. Gates, 150 Ind. 59, 61.) It was held by the Appellate Court on the former appeal that the counter-claim "is based upon a breach of contract." After said cause was returned to the Court below a second trial resulted in a verdict and judgment in favor of Appellee against said three defendants to said counter-claim, in the sum of $184.74 and costs. Before the appeal was taken from said judgment, George W. Northrup, Jr., one of the plaintiffs below and one of the persons against whom said judgment was rendered, died.

Appellee insists that this court has no jurisdiction of this appeal for the reason that the personal representative of George W. Northrup, Jr., deceased, a co-party to said judgment, has not been made an appellant.

This is a vacation appeal and it is well settled that all the parties against whom the judgment was rendered must be made co-appellant on appeal or the appeal will be dismissed for want of jurisdiction. (Rich Grove Township et al. v. Emmet (this term) and cases cited.)

Section 648, Burns 1901 (636 R. S. 1881 and Horner 1901), provides that: "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of appeal served upon, the persons in whose favor and against whom the action might

have been revived, if death had occurred before judgment."

Section 272, Burns 1901 (271 R. S. 1881 and Horner 1901), provides that "No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint, at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

It is clear under our Statutes concerning the causes of action that survive, secs. 283, 284, 285, Burns 1901 (282, 283, 284 Horner 1901), that causes of action for breaches of duty by Attorneys to their clients by which the property rights and interests of the clients are affected injuriously, survive the death of either party. Weeks on Attorneys at Law, p. 625; Allen v. Clark, Exr., 11 Weekly Reporter 304, 7 L. T. N. S. 781; Knight v. Quarrels, 4 Moore 532, 2 Brod. & B. 102; Feary v. Hamilton, 140 Ind. 45, 51-53, and cases cited; Boor v. Lowry, 103 Ind. 468 and cases cited; 53 Am. Rep. 519, and note pp. 525-539; Hess v. Lowry, 122 Ind. 225, and cases cited; 33 Albany L. J. pp. 184-187, 204-208, and cases cited.

It is true that after the death of a member of a partnership the surviving partner or partners are

vested with the exclusive right of possession and management of the partnership property, including the exclusive right to collect the debts due the partnership by suit or otherwise. (Parsons on Partnerships, secs. 342, 344, 345; McIntosh v. Zaring, 150 Ind. 301, 312, and cases cited; Valentine v. Wysor, 123 Ind. 47, 52.

In this State a firm creditor is not required to exhaust his remedy against the surviving partners or show that they are insolvent before he can resort to the estate of the deceased partner. He may proceed at once on the death of a partner against the estate of the deceased partner as well as against the surviving partners. (Ralston v. Moore, 105 Ind. 245; see Camp v. Grant, 21 Conn. 41, 55-56.) If suit was not commenced on said claim against the members of the partnership before the death of the partner, the statute requires that the proceeding against the estate be by claim filed against said estate under Sec. 2463, Burns' 1901. In other words, while rights of action for liabilities due a partnership survive and vest exclusively in the surviving members of the firm, the liabilities of the partnership on the death of a partner, survive not only against the surviving partners but also against the estate of the deceased partner.

In this case, Northrup died after the rendition of the judgment on the counter-claim against him and his co-defendants to the counter-claim, Newman and Levinson. Such a judgment binds the partnership property and the individual property of each judgment defendant, and may in the absence of a statute to the contrary, be enforced by execution against the separate property of each of

said judgment defendants before having recourse to the partnership property. (Story on Partnership, Sec. 260.)

Said Northrup having died after the counter-claim was filed, the case stands, so far as the question under consideration is concerned, in all respects the same as if said counter-claim was an independent action against the defendants thereto, and judgment had been rendered in favor of appellee for said sum of $184.74. If an independent action had been commenced against the members of said firm for the cause of action set up in said counter-claim, in the Court below, and thereafter and before judgment, said Northrup had died, then his administrator or executor could have been made a party defendant in said action and the same prosecuted to final judgment, under the provisions of Sec. 272 (271), *supra.*

As said cause of action could have been revived against the personal representative of said Northrup under Sec. 272 (271), *supra,* it follows, under the provisions of Sec. 648, *supra,* that such personal representative was a necessary party appellant to the appeal and should have been made a co-appellant and served with notice. (Richgrove Tp. v. Emmett (this term), and cases cited.)

The prohibition of Sec. 2465, Burns 1901, against bringing actions against an executor or administrator by complaint and summons, and requiring all claims against the estate to be filed in the clerk's office, does not apply to such a case. It relates to the bringing of actions, and not to those brought before the death of the deceased, while Sec. 272 (271), *supra*, has reference to actions al-

ready commenced and forbids their abatement by the death of any or all the parties if the cause of action survives, and provides for the prosecution of the action by or against the personal representative of the deceased party. (Holland v. Holland, 131 Ind. 196, 200, 201; Clodfelter v. Hulett, 92 Ind. 426, 434; Lawson v. Newcomb, 12 Ind. 439; Burnett v. Milnes, 148 Ind. 230, 235; I Woollen's Trial Procedure, Secs. 555-561.)

On account of the failure to make the personal representative of Geo. W. Northrup, Jr., a co-appellant, the Court has no jurisdiction to determine the case upon its merits. The appeal must, therefore, be dismissed. (Richgrove Township v. Emmett (this term), and cases cited.

Appeal dismissed.

It is therefore considered by the Court that the appeal from the judgment of the Court below in the above entitled cause, be dismissed, at the cost of the appellants, all of which is ordered to be certified to said Court.

And it is further considered and adjudged by the Court that the appellee recover of the appellants the sum of $....., for his costs and charges in this behalf expended."

The assignment of alleged errors for consideration by the Supreme Court of the United States will be found in the Transcript, pp. 332-33, and is:

The Supreme Court of Indiana erred in holding and deciding:

"1. That the counter-claim set up by Appellee Gates, the defendant, in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against Appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States.

2. That the appellee's counter-claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrup & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana nor the Supreme Court of the State of Indiana had jurisdiction to determine the appeal and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, Section 1, of the Constitution of the United States, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," which adjudication was adverse

to appellants' claim under said provision of the Constitution of the United States.

"For which errors the appellants, Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrup & Levinson, pray that the judgment of the said Supreme Court of Indiana, dated June 21, 1905, be reversed and a judgment entered for the appellants aforesaid and for costs."

POINTS AND AUTHORITIES.

The Supreme Court of the United States is without jurisdiction of the subject-matter of this proceeding upon Writ of Error for the following reasons:

FIRST.

The question determined by the Supreme Court of the State of Indiana was one of practice. That Court held that it had no jurisdiction to determine the case upon its merits because of the failure to make the personal representative of George W. Northrup, Jr., deceased (in accordance with the law of the State of Indiana, provided in certain statutes set forth in the opinion), a co-appellant. The Supreme Court of the State of Indiana as it appears from the opinion itself, limited its decision to the construction and interpretation of the statutes of the State of Indiana and no Federal question was raised or discussed in the opinion. Under these circumstances the Supreme Court of the United States is without jurisdiction and the cause should be dismissed.

Questions of practice and proceeding in State Courts are for the exclusive determination of the Tribunals of the State where they may arise.

Tripp v. Santa Rosa, etc., Co., 144 U. S. 130;
Mills v. St. Clair County, 8 How. 569, 586.

Where the opinion of the State Court is confined to the construction or interpretation of a State Statute and there is no contention that such statute conflicts with any right, privilege or immunity preserved by the Federal Constitution the opinion of the State Supreme Court is final and the Supreme Court of the United States has no jurisdiction to revise such opinion whether it be erroneous or not.

McBride v. Hoey, II Pet. 167;
Nesmith v. Sheldon, 7 How. 812;
Grand Gulf, etc., Co. v. Marshall, 12 How. 165.

SECOND.

No matter what meritorious questions were involved and raised in the assignment of errors in the State Appellate Court and even though a Constitutional question were involved and erroneously decided in the trial court—if the case be not properly appealed to such StateAppellate Court, those questions can not be considered upon the appeal. The Supreme Court of Indiana can not determine a question which has not been duly and properly brought before it. Nor is it for this Court to determine whether the Supreme Court of Indiana erred or not in

deciding that the appeal was not properly taken. Counsel for plaintiffs in error must concede this. Otherwise they find themselves in the anomalous position of insisting that the Supreme Court of the United States may perfect the imperfect appeals which come before the various State Courts because somewhere in the trial of the cause, before the trial Court a question was raised involving some provision of the Federal Constitution.

Indeed, it appears from the writ of error filed in this Court that the theory of the Counsel for plaintiffs in error is somewhat of such a nature. They contend that by reason of the dismissal of the appeal by the Supreme Court of Indiana, because of the failure of the present plaintiffs in error to join the proper parties in the appeal as required by the Statutes of the State of Indiana, that Court necessarily denied full faith and credit to the judgment rendered by the Circuit Court of Cook County in the State of Illinois, in that by such dismissal, that Court recognized and necessarily held that the counter-claim of the appellee was valid and that it was not necessarily involved and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, and that hence this Court has jurisdiction to consider the case upon the merits.

In this, as we see it, Counsel labor under a misapprehension. The Supreme Court of Indiana did not necessarily, nor, in fact, hold by its judgment of dismissal, that the counter-claim of appellee was valid, and that the issue presented by the counter-claim was not necessarily involved and adjudicated by the Illinois Court. In fact, the

Indiana Supreme Court held that it did not have jurisdiction of the appeal because, *technically*, the Indiana Statutes regulating appeals had not been complied with, and because *substantially* any decision it might make, if in favor of the appellee, would be ineffective inasmuch as it would not be conclusive upon the representative of the deceased judgment debtor who was not before the Supreme Court of Indiana. Logically, the decision of the Indiana Supreme Court can not be carried farther; it stopped short of the merits of the case, neither approving nor disapproving the action of the trial Court, because the merits of the case were not brought before the Indiana Supreme Court in such a way as that it could render a judgment that would have been at once complete and final.

This Court has refused in cases in which questions of a similar nature have arisen to review the decision of the State Tribunal.

Tripp v. Santa Rosa St. R. R. Co., 144 U. S. 130;

Chappell Chemical, etc., Co. v. Sulphur Mines Co., 172 U. S. 473.

THIRD.

Closely allied to these decisions is another line of authorities which is an answer to any such contention upon the part of Counsel for plaintiffs in error and which effectually disposes of the case.

In this case the Supreme Court of Indiana in its decision proceeded upon the general principles of the juris-

prudence of the State and all the matters in the issue decided were questions of general law, without reference to any Federal question. This being so, the Supreme Court of the United States has no jurisdiction to review the decision of the Supreme Court of Indiana even upon the suggestion made that if the State Court erred, it thereby deprived the plaintiffs in error of some safeguard insured by the Federal Constitution.

Servier v. Haskell, 14 Wall. 15;
Palmer v. Marston, 14 Wall. 10-12;
Hoyt v. Sheldon, 1 Black. 521.

FOURTH.

The question of whether full faith and credit is given the judgments of one State by another State does not arise in this case. Even conceding, for the argument, that the dismissal of the appeal by the Supreme Court of the State of Indiana necessarily recognized and determined that the matters pleaded in the counter-claim of the defendant in error were valid and were not adjudicated by the judgment of the Illinois Court, it is not a denial of full faith and credit of such judgment for the Supreme Court of Indiana to hold that such judgment of the trial Court of the State of Illinois is or is not an estoppel as to certain matters set up by way of counter-claim to such judgment when sued upon in Indiana. What questions are *res judicata* under a judgment rendered in the Courts of Illinois are questions of fact in the State of Indiana. A suit *in assumpsit* in Illinois at

issue under the laws of Illinois by the plea of *non assumpsit* is tried by and under the laws of Illinois and the decisions of the Supreme Court of that State, and evidence must be introduced in the State of Indiana to establish as matter of fact, what those laws and decisions are.

It is obvious, then, that all that the Supreme Court of Indiana necessarily assumed with respect to this appeal as it was presented to that Court, for the purpose of determining its own appellate jurisdiction, was:

1. A judgment was rendered by the Circuit Court of Cook County, Illinois, against the defendant in error, in favor of the plaintiffs in error *and Geo. W. Northrup, Jr.*

2. That in Indiana when suit was brought upon such judgment a counter-claim was filed by the defendant in error, setting up certain matters of fact which raised the issue of ultimate fact whether the statutory and common law of the State of Illinois permitted the defendant in error thus to counter-claim against a valid judgment rendered by a court of said State of Illinois. And that at the trial of such counter-claim upon the facts pleaded therein judgment was rendered in favor of the defendant in error, over and beyond the judgment sued upon, against the plaintiffs in error *and Geo. W. Northrup, Jr.*

3. That Geo. W. Northrup, Jr., one of the parties against whom said judgment was rendered, died after such judgment was rendered.

4. That his representative was not made a party to the appeal as it appeared upon the record and

as required by the Statutes and Laws of the State of Indiana.

Whereupon the Supreme Court of the State of Indiana dismissed the appeal.

By so doing the Supreme Court of Indiana in no way questioned the judgment of the Illinois Court and full faith and credit was not denied it.

Lloyd v. Matthews, 155 U. S. 222, 226;
Glenn v. Garth, 147 U. S. 360, 368;
Finney v. Guy, 189 U. S. 335, 339.

In Finney v. Guy, 189 U. S., *supra*, at page 341, the Court say:

> "If the case had been on trial upon issues of fact, among them being one as to what the law of Minnesota was, and the Statutes as well as the decisions above mentioned had been proved and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those Statutes and decisions, his testimony would not, even though uncontradicted, conclude the Court upon that issue. * * * * * In other words, Statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very Statutes and decisions. * * * * *

At page 343 the opinion continues.

> "This right and duty of the Courts to themselves construe the Statutes and decisions are not altered because the law of the foreign State and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial."

The effect of the conclusion reached by the Supreme Court of the United States in Finney v. Guy, *supra*, was that the decision of the Supreme Court of the State of Wisconsin holding that notwithstanding a judgment rendered in the State of Minnesota, coupled with the allegation that under the law of Minnesota the defendant in error was bound by such decision, that the defendant in error was not precluded by such judgment of Minnesota, was not a denial of full faith and credit to such judgment.

In Glenn v. Garth, supra, at page 368, the court say:

> "If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York Court was against a right specially set up and claimed under the Constitution of the United States, *or necessarily arising*, but whether in that decision error intervened in the construction of the Statutes of Virginia. If every time the Courts of a State put a construction upon the Statutes of another State, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded

that the construction was incorrect, it would follow that the State Courts had refused to give full faith and credit to the Statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." (See also the cases referred to in the opinion.)

Baltimore, etc., Railroad v. Hopkins, 130 U. S. 210;

Grand Gulf, etc., Co. v. Marshall, 12 How. 165-168.

Continuing, at page 369, the Court say:

"* * * Nor can the contention of Counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

In Lloyd v. Matthews, *supra*, at page 226, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"The Federal question upon which plaintiff relies to sustain our jurisdiction is that under the Statutory law of Ohio, set out in his pleading, the transfer of the stock in question was void, and that the Court of Appeals in Kentucky in rendering judgment did not give that full faith and credit to the public acts, records, and judicial proceedings of the State of Ohio which the Constitution and the law of the United States require. (Const., Art. IV, Sec. 1; Rev. Stat., Sec. 905.) The first error

assigned is as follows: 'The Court of Appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the State of Ohio which were presented in the pleadings; in failing to give full faith and credit to the judicial construction of such laws by the highest Court of said State; and in failing to give full faith and credit to the judicial proceedings of the Probate Court of Hamilton County, Ohio, as set forth in the pleadings'." * * *

"Now, in arriving at these conclusions, the Court of Appeals did not concur with the views of Harper's assignee, but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of that State? The Courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several States, but in the Supreme Court of the United States, when acting under its Appellate jurisdiction, whatever was matter of fact in the State Court whose judgment or decree is under review is matter of fact there. And whenever a court of one State is required to ascertain what effect a public act of another State has in that State, the law of such other State must be proved as a fact." * * *

"The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that, under such circumstances, where the validity of a State law is not drawn in question, but merely its construction, no Federal question arises."

FIFTH.

Thus far we have argued that no Federal question arises on this record for the Supreme Court of the United States to consider and therefore this court has no right to entertain the Writ of Error. There is yet another reason why this Court should dismiss this proceeding. The precise question upon which plaintiffs in error rely in this Court was raised for the first time in their petition for re-hearing, filed in the Supreme Court of the State of Indiana, which petition was overruled without comment or reference by the Supreme Court of Indiana to such Constitutional questions referred to in such petition for re-hearing. Upon the general proposition that a Federal question is raised too late when suggested for the first time in a petition for re-hearing after judgment in the highest court of a State where such petition is denied without opinion, we make reference to the following decisions:

Bushnell v. Crook, etc., Co., 148 U. S. 690;
Pim v. St. Louis, 165 U. S. 273;
Capital N. Bank v. First N. Bank, 172 U. S. 425;
Turner v. Richardson, 180 U. S. 87;
Johnson v. N. Y. Life Ins. Co., 187 U. S. 491;
Weber v. Rogers, 188 U. S. 10;
Mutual L. Ins. Co. v. McGrew, 188 U. S. 291;
Scudder v. Coler, 175 U. S. 33.

The question of full faith and credit to the judicial records of another State by reference to the Article of the

Constitution was raised by the objection to the introduction of the record of the proceedings of the Cook County Circuit Court upon that ground, in the trial Court, and discussed in the Appellate Court as well as the Supreme Court of the State of Indiana. But the precise question now raised, namely, that the dismissal of the appeal necessarily recognized and determined that the matters presented in the counter-claim of the defendant in error were valid and were not adjudicated by the judgment of the Illinois Court, "and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between parties in the State of Illinois, where it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States, etc., etc.," was not raised or even suggested at any time in the entire proceedings until plaintiffs in error filed their petition for rehearing, and this notwithstanding the fact that defendant in error insisted upon such dismissal in the Appellate Court, as well as when the case reached the Supreme Court of the State of Indiana and based his motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon the ground that the Appellate Court decided erroneously that the appeal should not be dismissed.

Even though the precise provision of the Constitution may have been properly presented as involved in one stage of the case, yet if it is sought to sustain another contention upon another theory of the law involving the same

provision of the Constitution, the Supreme Court of the United States has held in a recent case that such latter contention is raised too late when referred to for the first time in the petition for rehearing.

Cox v. State of Texas, 202 U. S. 446.

For the foregoing reasons it is submitted that the motion to dismiss or affirm made by the defendant in error should be sustained.

Respectfully submitted,

ALBERT BAKER,
EDWARD DANIELS,
LEWIS C. WALKER,
EDWARD E. GATES,
Counsel for the said defendant in error,
for the purposes of the motions.

Supreme Court of the United States.

No. 137.—October Term, 1906.

Jacob Newman and Salmon O. Levinson, surviving partners of the firm of Newman, Northrop & Levinson, Plaintiffs in Error, *vs.* Harry B. Gates. } In error to the Supreme Court of the State of Indiana.

[January 7, 1907.]

Jacob Newman, George Northrop, Jr., and S. O. Levinson commenced this action in the Superior Court of Marion County, Indiana, against the defendant in error, H[illegible] Gates. Recovery of the sum of $1,400 was sought upon a judgm[illegible]d by Newman and his co-plaintiffs against Gates in the Circuit [illegible]of Cook County, Illinois. The defendant filed an answer in two pa[illegible]graphs, but as the defenses therein asserted were ultimately abandoned they need not be detailed. A counter claim was also filed, in which it was alleged that the plaintiffs were and for more than two years had been attorneys at law engaged in the practice of their profession at Chicago, Illinois, under the firm name of Newman & Northrop; that the Illinois judgment sued upon was founded upon a claim for legal services rendered to the defendant; that the services had been rendered in advising the defendant, as trustee, in and about the management of the property and assets of a corporation known as the American Mortar Company while in course of administration in insolvency proceedings, and that the defendant had sustained damage to the extent of two thousand dollars by reason of a breach of duty alleged to have been committed by the plaintiffs in the course of their employment in failing to obtain an order of the court in the insolvency proceedings relieving the defendant from personal liability for attorney's fees and providing for payment of his compensation, etc. It was also charged that the plaintiffs had been guilty of a breach or neglect of duty in connection with a sale of the trust property in the insolvency proceedings, whereby defendant had sustained damages in the sum of $2,500. A reply was filed to the counter claim, in two paragraphs, one embracing a general denial and the other setting up the Illinois judgment as *res adjudicata* as to all the matters embraced in the counter claim.

In due course the case came on for trial and the plaintiffs recovered a judgment for the amount of their claim. The case was taken to the

Appellate Court of Indiana. That court reversed the judgment and remanded the case for a new trial, (*Gates* v. *Newman*, 18 Ind. App. 392,) and for want of authority a petition for a writ of certiorari was denied by the Supreme Court of Indiana. (150 Ind. 59.) In the opinion of the Appellate Court, as also in a dissenting opinion, the character of the counter claim and the question whether, as respects the matters therein set forth, the Illinois judgment was *res adjudicata*, were considered at great length. Following an inspection of the record of the Illinois action the court held that the counter claim stated matters which constituted something more than a mere defense to the claim asserted in the Illinois action, that it could not be said that under the plea of the general issue interposed by the defendant in that action the matters averred in the counter claim were necessarily adjudicated, and that it was a question to be determined upon the trial whether *in fact* such matters had been theretofore litigated and determined. On the new trial the court held that certain of the issues made by the counter claim and reply had been litigated in the Illinois action and that the Illinois judgment was *res adjudicata* as to such issues, but submitted to the jury the question of the alleged neglect of plaintiffs in failing in the insolvency proceedings to procure an order charging the trust estate with the fees in question and the compensation earned by defendant as trustee. And the court left it to the jury to determine upon a preponderance of evidence whether or not it was the law of Illinois that the failure of plaintiffs to procure such an order, if they did so fail, was a matter which was adjudicated in the Illinois action, whether evidence was introduced on such point or not, and the jury was instructed that if such was the law of Illinois recovery could not be had upon the counter claim.

The second trial resulted in a verdict of $181.74 for the defendant Gates, that being the sum found to be due him in excess of the amount of the judgment sued upon. After the entry of judgment and before the taking of an appeal George W. Northrup, Jr., one of the original plaintiffs, died. An appeal, however, was taken to the Appellate Court of Indiana by Jacob Newman and S. O. Levinson, describing themselves as surviving partners of the firm of Newman, Northrop & Levinson. The personal representative of the deceased partner was not made a party to the appeal. The Appellate Court of Indiana overruled an objection to the sufficiency of the appeal and on the merits reversed the judgment and ordered the cause remanded for a new trial. On the petition of the defendant Gates the Supreme Court of Indiana removed the cause into that court for decision and subsequently dismissed the appeal, holding that on account of the omission to make the personal representative of George W. Northrop,

Jr., a co-appellant the appeal could not be determined upon the merits. (165 Ind. 171.) A petition for a rehearing having been denied, the cause was brought here.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A motion has been filed to dismiss the writ of error or to affirm, and we proceed at once to its consideration. Several grounds are urged in argument in support of the motion, but we do not find it necessary to do more than consider an objection based upon the absence of a Federal question.

The errors assigned are as follows:

"The Supreme Court of Indiana erred in holding and deciding:

"1. That the counter claim set up by appellee Gates, the defendant, in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment, contrary to and in violation of article 4, section 1, of the Constitution of the United States.

"2. That the appellee's counter claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrop & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana, nor the Supreme Court of the State of Indiana, has jurisdiction to determine the appeal and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court necessarily involved the adjudication of the claim of the appellants to the protection of article 4, section 1, of the Constitution of the United States, 'that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' which adjudication was adverse to appellants' claim under said provision of the Constitution of the United States."

These assignments plainly import that the Supreme Court of Indiana on dismissing the appeal considered and decided a question which had been submitted to the jury on the trial, viz., whether the matters alleged in the counter claim as the basis for a recovery over against the plaintiffs had or had not been concluded by the Illinois judgment sued upon by the plaintiffs. We do not so construe the opinion and decision of the court.

The Appellate Court of Indiana had held on the first appeal that the action of the trial court, in refusing to admit evidence in support of the

counter claim, because the Illinois judgment constituted *res adjudicata*, was error. It had further decided that the counter claim was "based upon a breach of contract," and constituted an independent, affirmative cause of action in favor of the defendant, and that whether the questions therein involved were in fact adjudicated in the Illinois action was a question for the jury. As a result of this ruling evidence was introduced at the subsequent trial to establish what were the questions litigated and determined in the Illinois action and the extent to which by the laws of Illinois the judgment in that case possessed conclusive force.

Now, in the opinion delivered by the Supreme Court of Indiana, on dismissing the appeal, the court did not discuss or in any wise refer to the scope and conclusive effect of the Illinois judgment. Undoubtedly, the court, in view of the law of the case as declared on the first appeal, treated the counter claim as containing allegations of actionable breaches of duty which might have formed the subject of an independent action, and it is likewise evident that the court was of opinion that the plaintiffs were bound to perfect their appeal from the judgment upon the counter claim, upon the hypothesis that the counter claim set forth a valid cause of action against three individuals, viz., the plaintiffs in the main action. But substantially the court only considered and disposed of a preliminary question as to its authority to pass upon the controverted questions contained in the record before it. It found that there were in the counter claim averments which it had been held early in the litigation required to be submitted to a jury, that the record exhibited a recovery upon the counter claim against three persons, and that one of such persons had died after the rendition of judgment against him and his associates. Construing the statutes of Indiana, the court held that the cause of action asserted in the counter claim survived the death of the party deceased, against whom a recovery had been had, that such cause of action could have been revived against the personal representative of the deceased, and that the personal representative was a necessary party appellant, and, not having been made a co-appellant and served with notice of the appeal, the court was without jurisdiction to pass upon the errors assigned upon the appeal. To give effect to the assignments of error we should be obliged to make the impossible ruling that, despite the overruling of a demurrer to the counter claim by the trial court, and the decision in respect to that pleading made by the Appellate Court on the first appeal, a mere inspection of the counter claim so plainly demonstrates that the pleading is destitute of merit that it should be held to have been the duty of the State court of last resort to have treated the pleading as a sham and to have disposed of the appeal upon the hypothesis that the counter claim was non-existent.

The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after

transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. (*Oster* v. *Broe*, 161 Ind. 114.) Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of State courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.